Clinton Electronics Corporation *and* United Steelworkers of America, AFL–CIO–CLC. Cases 33–CA–11536 and 33–CA–11725 (1–2)

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On September 18, 1997, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings,[1] findings, and conclusions and to adopt the recommended Order as modified.[2]

As further explained below, we agree with the judge that the Respondent's warning notice to employee Dan Lee violated Section 8(a)(3). Contrary to our dissenting colleague, we also agree with the judge that the statements attributed to supervisors Bernadine Prock and Betty Krueger violated Section 8(a)(1).

1. In February 1996 the Respondent issued a warning notice to Lee, a union supporter, because of complaints from employee Leonard Thomas Walsh that Lee was harassing him. Lee's conduct consisted of soliciting Walsh, at work and at Walsh's home, about joining the Union.

While Walsh may have been annoyed at being solicited about union matters at home, it is beyond dispute that, as the judge observed, "home solicitation is not an activity which is unprotected by the Act." We also agree with the judge that there is no evidence that Lee conducted himself at Walsh's home in a manner that would warrant depriving his soliciting of the Act's protection.

In its exceptions brief, the Respondent argues that the "sole reason" it issued the warning notice was because Walsh complained about Lee bothering him while Walsh was working. Even accepting this assertion as true, the Respondent still violated the Act.

The Respondent's handbook proscribes solicitations "except when both the person doing the soliciting and the person being solicited are on break, on meal time, or otherwise are properly not engaged in performing their work tasks." Nonetheless, as the judge found, the record shows that Respondent tolerated solicitations during work time by employees with significant regularity. The application of a valid no-solicitation rule in a discriminatory fashion is a violation of the Act. *Reno Hilton*, 320 NLRB 197, 208 (1995). It follows, then, that the Respondent violated the Act by disciplining Lee for soliciting for the Union, while permitting solicitations for other purposes. *Westinghouse Electric Corp*., 240 NLRB 905, 916 (1979), enfd as modified 612 F.2d 1072 (8th Cir. 1979). Nor may the Respondent rely on Walsh's annoyance about being solicited while working, as there is no evidence Lee's soliciting activity differed in any significant manner from the other soliciting the Respondent permitted.

2. Supervisor Prock, in response to employee Bonnie Smith's query about what Prock thought of the Union, replied, "[O]ff the record, Bonnie, it's my opinion that we could all be looking for a job." The judge found that this statement, which employee Holly Vineyard overheard, was a threat that employees could lose their jobs if the Union succeeded. We agree.

Our dissenting colleague, examining the "context" of Prock's statement, lists an array of factors, which, in effect, he says neutralized or legitimized Prock's statements. However, threats of job loss violate Section 8(a)(1) "because these acts reasonably tend to coerce employees in the exercise of their rights, regardless of whether they do, in fact, coerce." *Central Transport v. NLRB*, 997 F.2d 1180, 1191 (7th Cir. 1993) (rejecting employer's claim that alleged comments were not threats because they were merely "man-to-man confidence" and "merely statements of opinion based on . . . . 'gut feeling.'"). That Prock couched her remarks in terms of her opinion, is insufficient to mitigate their coercive effect.[3] As the Supreme Court has acknowledged, the "Board has often found that employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619–620 (1969).

3. The judge found that supervisor Krueger unlawfully interrogated employee Debbie Williams. We agree.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the recommended Order to comply with the Board's decision in *Excel Container,* 325 NLRB 17 (1997). We shall modify the notice to include reference to the Sec. 8(a)(3) violation found by the judge.

[3] *Standard Products Co.,* 281 NLRB 141, 151 (1986), cited by the Respondent and our dissenting colleague, is distinguishable for the reasons stated by the judge.

Our dissenting colleague's analysis relies in part on the fact that Krueger's statement was a declaration and not a question. Such reasoning elevates form over substance. Krueger stated to Williams on a Monday morning that "she knew [Williams] went to the union meeting" held over the weekend. No matter how framed, Krueger's statement clearly sought, even compelled, a response. Just because a statement does not have a question mark at the end does not detract from its coercive potential. Again, our colleague lists an array of factors, which he says neutralized this alleged interrogation. While consideration of those contextual factors is not inappropriate in the case of an interrogation allegation, we disagree with the dissent's ultimate conclusion that the circumstances do not suggest coercion. Certainly, a reasonable person, confronted by her supervisor saying that she knew that the employee had attended a union meeting, would think twice and likely be disinclined to engage in further union activities. That is garden variety 8(a)(1) interference, restraint, or coercion.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Clinton Electronics Corporation, Loves Park, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its Loves Park, Illinois place of business copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 12, 1996."

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

2. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, concurring in part and dissenting in part.

I concur with my colleagues' adoption of the judge's decision except in the following respects. I would reverse the judge's findings that the statements attributed to supervisors Bernadine Prock and Betty Krueger violated Section 8(a)(1).

1. The complaint alleges that Prock "told employees that they would lose their job if the Union came in." Employee Smith and supervisor Prock, who were friends, engaged in a conversation on the production floor in February 1996. Smith asked Prock for her opinion of the Union and Prock replied, "[O]ff the record, Bonnie, it's my opinion that we could all be looking for a job."

Employee Vineyard, who was standing nearby, testified that she had overheard Prock say to Smith "if the Union comes in then we would all be looking for jobs." Vineyard then intervened in the conversation between Prock and Smith and asked Prock why she would say something like that. Smith walked away. In response to Vineyard, Prock replied, "[B]ecause we would all be looking for jobs if the Union came in there."

The judge credited the testimony of Vineyard and Smith, and found a violation. I accept the credibility resolution, but I disagree that the conversations with the two employees were unlawful. In this regard, I note that Prock's remarks to Smith were made in the context of a conversation between friends, and was a response to Smith's asking for Prock's opinion regarding the Union. In the same vein, Prock was careful to note that she was conveying only her personal opinion and understanding. Further, the remarks were made on the shop floor, not in any managerial or supervisory offices. In these circumstances, it is difficult to believe that an employee would reasonably think that Prock was conveying a Respondent threat to terminate employees in retaliation for unionization.

Turning to Prock's conversation with employee Vineyard, I note that it occurred because Vineyard overheard a small part of the aforementioned conversation between Prock and Smith on the shop floor. Vineyard immediately asked Prock about the remark. Prock's response was somewhat similar to the one she had just made to Smith. Inasmuch as the remark to Vineyard was made in the same circumstances as the remark to Smith, and inasmuch as the former remark was lawful, I find that the latter remark was lawful as well.

My colleagues state that "threats of job loss violate Section 8(a)(1)." In my view, this puts the proverbial

rabbit in the hat. The issue in this case is *whether* the remarks were an employer threat of job loss. In my view, all relevant circumstances should be considered in deciding when a supervisor's remark is a threat. My position is supported by *Standard Products Co.*, 281 NLRB 141, 151 (1986). In that case, the Board considered all of the relevant circumstances, including a "personal opinion" of the supervisor that he thought that the plant would close down if the union were selected. The Board determined that the supervisor's remark did not convey an employer threat. More particularly, in *Standard Products*, these relevant circumstances included the fact that the employee initiated the conversation. In addition, there were two versions of the conversation in that case, both of which included the words "personal opinion." In my view, this approach clearly indicates that the words "personal opinion" must be a factor to be considered as part of the context.

To be sure, the intention of the speaker is not the critical test in resolving these 8(a)(1) issues. However, the use of the words "personal opinion," in context, are relevant in determining the impact of the statement on a reasonable employee.

In *Central Transport v. NLRB*, 997 F.2d 1180, (7th Cir 1993), cited by the majority, the administrative law judge had concluded that [Shop Manager] "Carr's threats were more than mere personal expressions of opinion." In this regard, the judge had noted that: Carr had personally hired the employees; Carr had made several statements in a similar vein (including at the time he had hired employees); and Carr's father was a regional manager for the respondent.[5] Clearly, *Central Transport* is distinguishable from the facts of the instant case and provides no basis for finding Prock's remarks to be unlawful.

2. Early in the union campaign, employee Debbie Williams had been uncertain whether to support the Union. She asked Krueger, who was both her friend and supervisor, whether she could discuss the situation with someone in the personnel department. A meeting was arranged for her with Employee Relations Supervisor Betty Ploplys. Later, on a Saturday, Williams attended a union meeting. On the following Monday, when she went into the office to pick up a document, supervisor Krueger, who was in the office, said that "she knew [Williams] went to the Union meeting." Williams responded that "I thought it was our right to be able to do that." Krueger replied "yes it is" and dropped the matter.

I do not agree with the majority that Krueger's statement constitutes an unlawful interrogation. The test of whether an unlawful interrogation has occurred is whether, under all the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with the employees in the exercise of rights guaranteed by the Act. *Rossmore House.*[6] The Board has stated that an appropriate analysis of whether there is an unlawful interrogation must take into account the circumstances surrounding the alleged interrogation and must not ignore the reality of the workplace. Such analysis includes circumstances such as the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Sunnyvale Medical Clinic.*[7]

Here, I first note that Williams had originally raised her ambivalence about the Union with Krueger and had also discussed it with Ploplys. Second, the remark was a statement of something that was known. It was not a question, and there is no evidence that it was designed to elicit information.[8] Third, Williams was not summoned to an office to meet with high level officials. Rather, she entered an office for work-related reasons and, by chance, met Krueger, a low-level supervisor and her friend, who happened to be in the office. The conversation was spontaneous and brief. Finally, I note Krueger's quick agreement with Williams that she had the right to attend the meeting and that Krueger did not pursue the matter further. I am persuaded that, based on the totality of the circumstances, Krueger's statement was not an unlawful interrogation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

[5] *Central Transport*, 306 NLRB 166, 169 (1992).

[6] 269 NLRB 1176, 1177–1178 (1984), enf. sub nom. *Hotel Employees, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[7] 277 NLRB 1217, 1218 (1985).

[8] There is no allegation that the remark created an impression of surveillance.

WE WILL NOT coercively interrogate you concerning your activities on behalf of United Steelworkers of America, AFL–CIO–CLC, or on behalf of any other union.

WE WILL NOT threaten you with loss of jobs should you select the above-named union or any other union to be your collective-bargaining agent.

WE WILL NOT selectively and disparately enforce our valid no-solicitation rule by enforcing it against solicitation on behalf of United Steelworkers of America, AFL–CIO–CLC, or any other labor organization, while allowing other types of solicitation to be conducted.

WE WILL NOT issue written warnings or otherwise discipline you because of your support for or activity on behalf of the above-named Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL, to the extent not already done, within 14 days from the date of this Order, remove from our files the first written warning notice dated February 9, 1996, and issued on February 12, 1996, to Dan Lee and, also, any reference to that warning notice and WE WILL, within 3 days thereafter, or within 17 days of the date of this Order if that first written notice has already been removed, notify Dan Lee in writing that this has been done and that the unlawful first written warning notice will not be used against him in any way.

CLINTON ELECTRONICS CORPORATION

Sang-yul-Lee, for the General Counsel.
Norman R. Buchsbaum and *Lynn K. Edwards,* for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Rockford, Illinois, on February 11 through 14, 1997. On May 1, 1996,[9] the Regional Director for Region 33 of the National Labor Relations Board, (the Board), issued a complaint and notice of hearing in Case 33–CA–11536, based on an unfair labor practice charge filed on February 26, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). On July 1, the Regional Director issued a complaint and notice of hearing in Case 33–CA–11725–1–2, based upon an unfair labor practice charge filed on April 4, alleging additional violations of Section 8(a)(1 and (3) of the Act. By order dated August 20, the Regional Director consolidated those cases for hearing and decision.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,[10] on the briefs which were filed,[11] and on my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

I. INTRODUCTION

During the late summer of 1995, United Steelworkers of America, AFL–CIO–CLC, a labor organization within the meaning of Section 2(5) of the Act (the Union), initiated an organizing campaign among Loves Park, Illinois, employees of Clinton Electronics Corporation (the Respondent).[12] A representation petition was filed by the Union on February 6 and, following a 5-day preelection hearing, a decision and direction of election issued on March 27. No election was ever conducted, however, because the Union requested withdrawal of its petition, and that withdrawal was approved by the Regional Director on April 17.

The complaints allege that, during the union's campaign, Respondent violated Section 8(a)(1) of the Act by specified statements assertedly made to employees by particular admitted supervisors. The complaint in Case 33–CA–11536 also alleges that Respondent maintained an unlawful no-solicitation rule and, in addition, that Respondent's maintenance supervisor had selectively and disparately enforced that rule, by prohibiting union solicitations and distributions, during "early 1996." However, no arguments are advanced in the General Counsel's brief regarding the alleged unlawfulness of the rule. Moreover, the only evidence concerning selective and disparate enforcement of it arises from a first written warning notice dated February 9 and issued to maintenance department employee Dan Lee.

That warning notice is alleged also to have been motivated by Lee's assistance to the Union, as well as by his concerted activities, and, thus, to have violated Section 8(a)(3) and (1) of the Act. Similar unlawful motivation is alleged to have led to issuance of a first written warning notice to forklift operator or driver Debbie Williams on April 30.

[9] Unless stated otherwise, all dates occurred during 1996.

[10] The motion by Clinton Electronics Corporation to correct the record is granted, save for number 24 which was the date spoken by counsel in framing the question reproduced there. For the most part the motion is unopposed. To the extent that some corrections are opposed except for item number 24, those corrections are consistent with my notes and also with related portions of the record.

[11] I deny the Motion to Strike Portions of the General Counsel's Brief. To the extent that it statements in the brief are inconsistent with the record, I have reviewed the record and rely upon what is shown there, as opposed to counsels' characterizations of what is claimed to be disclosed by the record.

[12] Respondent has been a Delaware corporation engaged in the manufacture and sale of cathode ray tubes, monitors, and other electronic products at Loves Park where it maintains an office and place of business. It admits that at all material times it has been engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, based on the admitted facts that, in conducting its business operations during each of the 12–month periods ending May 1 and July 1, it sold goods valued in excess of $50,000 which it shipped from its Illinois facilities directly to points outside of Illinois and, further, during the 12–month period ending July 1 it purchased goods valued in excess of $50,000 which it received at Loves Park directly from points outside of the State of Illinois.

Respondent denies that any of its actions or its supervisors' statements to employees had been unlawful under the Act. More specifically, it denies that either of the warning notices had been motivated by considerations unlawful under the Act. In addition, it moves to dismiss the allegations pertaining to the warning notice issued to Williams and an asserted statement made to her which purportedly created an impression of surveillance of employees' union activities, on the ground that those allegations are not encompassed by either of the unfair labor practice charges and, therefore, are barred at this point from resolution under Section 10(b) of the Act.[13] But, it is not necessary to address that motion because a preponderance of the credible evidence fails to establish that the alleged conduct covered by the motion constituted a violation of the Act.

In that regard, certain principles should be addressed at the outset with respect to resolution of the motivation for the warning notices. As discussed post, neither Lee nor Williams appeared to be a wholly credible witness. Were the Board's decisions concerning discrimination mere character rewards, the General Counsel might well be unable to prevail on the allegations regarding the warning notices. But, Board resolutions of discrimination allegations are not mere exercises in character rewards.

"The underlying purpose of this statute is industrial peace." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). "A fundamental aim of the . . . . Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce." (Citation omitted.) *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981). In short, the Act is intended to promote not private purposes, but public ones. Accordingly, that a particular alleged discriminatee may be possessed of less than good, even perhaps bad, character is not a basis for resolving whether or not a respondent has directed conduct toward that employee which disturbs the "maintenance of industrial peace" and, in turn, disrupts "the free flow of interstate commerce." Of course, that is consistent with the law's more general effort to guard against the tendency of character evidence to "subtly permit[ ] the trier of fact to reward the good man and to punish the bad man because of their respective characters despite with the evidence in the case shows actually happened." Cal. Law Revision Comm'n, Rep., Rec. & Studies, 615 (1964), quoted with approval in Advisory Committee's Note to Federal Rules of Evidence Rule 404(a).

In evaluating "what the evidence in the case shows actually happened," obviously a lack of candor by alleged discriminatees is one factor, which must be weighed. Nonetheless, the ultimate question where discrimination is alleged is the actual motivation of the respondent. See, *Schaeff Inc.*, 321 NLRB 202, 210 (1996), enfd., 113 F.3d 264 (D.C. Cir. 1997), and cases cited therein. In consequence, even where an alleged discriminatee has been lacking in total candor, a preponderance of the credible testimony and other evidence may still lead to a conclusion that there has been unlawful motivation—that the respondent took disciplinary action against that employee which would not have been taken had the employee not been active on behalf of, or at least sympathetic toward, a union. See, *Wright Line*, 251 NLRB 1083 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Here, such a showing has been made with regard to the motivation for the warning notice issued to Dan Lee. It has not been made, however, with respect to the motivation for the warning notice issued to Debbie Williams. Regardless of her support for the Union, she disregarded a work rule and Respondent's officials credibly testified that she was issued a warning notice solely for that reason, without regard to her prior union support and activities. Furthermore, as discussed in succeeding sections, it appeared that in her effort to construct a case against Respondent, Williams added to a single unlawful statement made to her, thereby attempting to portray Respondent in a more unfavorable light. Consequently, while the evidence does support Williams' testimony that she had been coercively interrogated, as discussed in section III, infra, I do not conclude that her accounts of other statements made to her by supervisors were credible.

II. THREAT OF JOB LOSS ATTRIBUTED TO BERNADINE PROCK

Coating Department Supervisor Bernadine Prock has been an admitted statutory supervisor and agent of Respondent at all material times. During February, coating department lab line worker Bonnie Smith had received a subpoena in connection with the representation hearing scheduled to commence on February 15. She and Prock had been friends for a number of years, going back to a time before the latter had been promoted to supervisor. The two women engaged in a conversation in the aisle on the production floor, between lines 3 and 4. As they conversed, coating department utility employee Holly Vineyard had been standing close enough to overhear their conversation.

Smith testified that she asked for Prock's opinion of the Union and that Prock had replied, "off the record, Bonnie, it's my opinion that we could all be looking for a job," but Prock did not explain why she had said that. Vineyard testified that she had overheard Prock say "if the Union comes in then we would all be looking for jobs." Both employees testified that Vineyard intervened, asking why Prock would say something like that. Smith testified that Prock "started talking to [Vineyard] and I walked away," overhearing only that, "They were talking about Bernie's statement that she said." However, Smith did not describe any of the words exchanged between Prock and Vineyard. Vineyard testified that, in response to her intervention, Prock had said, "because we would all be looking for jobs if the Union came in there."

Prock agreed that she and Smith had been discussing the Union, though she did not recall who had initiated that discussion. She admitted that she had said to Smith "that I was very concerned that if they would get in and demand too much that the Company would not be able to do it and it could possibly close. That was a big concern." Prock acknowledged that Vineyard had intervened at that point, asking how Prock could say that. To that question, Prock testified that she had replied, "Well, it's a concern of mine," adding that, "my understanding of union

[13] A third allegation covered by Respondent's motion to dismiss was withdrawn by the General Counsel during the hearing and, consequently, is no longer at issue.

shops is that they're extremely strict. And I says, like with her attendance, I says, Holly, you probably wouldn't even have a job." According to Prock, Vineyard responded, "well, if a union got in here I would have sick days and personal days and I wouldn't have a problem at all."[14]

Initially, Prock testified, "I think that was the end of our conversation basically." Asked if she had said that Respondent would not agree to more benefits, sick time or leave, personal days, however, Prock first did not answer directly, testifying, "I can't speak for the Company," and then claimed, "I could not, I do not recall saying that." As a result, she never did deny Vineyard's testimony that, when she had said "if a union got in here I would have sick days and personal days and I wouldn't have a problem at all," Prock had retorted "that we would not get personal or sick days." Vineyard testified that, at that point, "I just walked away."

The complaint alleges that Prock "told employees that they would lose their jobs if the Union came in," thereby violating Section 8(a)(1) of the Act. As set forth above, not only did Vineyard testify that Prock had made that remark, but so too did Bonnie Smith, a witness called by Respondent, testify that Prock had said "we could all be looking for a job." Both women appeared to be testifying candidly as to Prock's remarks. Indeed, Prock testified that she had said that Respondent "could possibly close."

"Both the courts and the Board have long recognized that the threat of job loss (i.e., discharge, layoff, and plant closure) because of union activity is among the most flagrant kind of interference with Section 7 rights . . . ." *Sheraton Hotel Waterbury*, 312 NLRB 304, 305 (1993). "Indeed, the natural and likely result of [such] threats . . . . [would be] to reinforce the employees' fear that they would lose employment if they persisted in their union activity." *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), enfd. mem., 833 F.2d 310 (4th Cir. 1987), cert. denied, 485 U.S. 1021 (1988). Whether Prock said "would" or "could" lose their jobs is not a dispositive consideration. Such prefatory words as "possibly," "likely," or "may" do not mitigate the affect on employees of the substance of a threat of job loss being communicated to them. *L'Eggs Products Inc.*, 236 NLRB 354, 388 (1987), enfd. in pertinent part, 619 F.2d 1337 (9th Cir. 1980).

Respondent does not truly dispute the foregoing principles. Rather, it argues that the circumstances under which Prock made her statements, first to Smith and, then, to Vineyard, were such as to negate any coercive affects that job loss remarks might otherwise convey: the conversation had started as a casual one between friends, one of whom only relatively recently been appointed to her low-level supervisory position; the conversation had been of short duration and had been initiated by the employee (Smith), was overheard by a second employee (Vineyard), who was an open union supporter and the supervisor advanced only a personal opinion heard only by those two employees; the conversation had occurred on the plant floor, not in an office, and had constituted only legitimate discussion and argument; and, the only two employees involved each testified that she had not felt threatened by Prock's statements. While a facially impressive array of factors, they are not so persuasive, as defenses to a threat of job loss should employees select a bargaining agent, as might appear at first blush.

In the first place, nothing in the Act, or in the case law interpreting and applying it, requires some minimum number of employees to be interfered with, restrained, or coerced in order for Section 8(a)(1) of the Act to be violated. Just as an employer's unlawful discrimination against only some union supporters and activists is not negated simply because that employer did not discriminate against all union supporters, *Handicabs, Inc.*, 318 NLRB 890, 897–898 (1995), enfd., 95 F.3d 681 (8th Cir. 1996), pending certiorari, so also the fact that not all employees, or not even all union supporting employees, are targeted for interfering, restraining, and coercive statements does not somehow serve as a defense which negates the statutory violation arising because of statements directed only to some employees, or even to a single one of them.

Second, the Supreme Court has cautioned against relying upon probes of employees' "subjective motivations" during questioning by counsel "many months after a card drive," in connection with those employees' signed authorization cards. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969). That same concern would appear to apply with no less force to probes of employees' subjective reactions to threats and other unlawful statements. Indeed, it is well-settled that subjective reactions of particular employees are not a determinative consideration in assessing whether Section 8(a)(1) of the Act has been violated by an employer's statements and conduct. See, e.g., *Swift Textiles*, 242 NLRB 691, fn. 2 (1979).

The test under Section 8(a)(1) "is not whether the language or acts were coercive in actual fact, but whether the conduct in question had a reasonable tendency in the totality of the circumstances to intimidate." *NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985). "The issue is whether, objectively, [an employer's] remarks reasonably tended to interfere with the employee's right to engage in [a] protected act," *Southdown Care Center*, 308 NLRB 225, 227 (1992), and Section 8(a)(1) is violated whenever "the employer's conduct tends to be coercive or tends to interfere with the employees' exercise of their rights." *NLRB v. Okun Brothers Shoe Store*, 825 F.2d 102, 105 (6th Cir. 1987), cert. denied, 485 U.S. 935 (1988). See also, *Sioux Products, Inc. v. NLRB*, 684 F.2d 1251 (7th Cir. 1982). In short, in evaluating violations of Section 8(a)(1) of the Act, it matters not whether the employee to whom statements are made happens to be a Caspar Milquetoast or, perhaps like Smith and Vineyard, a rough old cobb whom no one could intimidate. Any other rule would reduce the test for violating Section 8(a)(1) to a rule of employee reaction, rather than a rule of law, leaving no predictability as to which statements and conduct would constitute a violation of the Act. It also would encourage the very probes of employees' subjective reactions which the Supreme Court appears to have cautioned against.

Third, it is no defense that Smith and Prock had been friends and that their conversation had been of only short duration. As to the latter, an unlawful threat can have a naturally coercive affect on employees whether uttered during a brief exchange or

[14] It is uncontroverted that Vineyard had one of the worst attendance problems at Respondent and, further, had received warnings because of her attendance.

during a prolonged dialogue. Respondent has cited no case where the test under Section 8(a)(1) of the Act has been made contingent upon the duration of the conversation in which a threat is uttered. Beyond that, "social relationships in themselves are not a sufficient basis to lift acts of illegal interference from the scope of [Respondent's] responsibility." *NLRB v. Big Three Industries Gas & Equipment Co.*, 579 F.2d 304, 311 (5th Cir. 1978), cert. denied, 440 U.S. 960 (1979). After all, as the Court went on to point out in that case, "Friends can unlawfully threaten their friends. Indeed, warnings of Company retaliation cast as friendly advice from a familiar associate might be more credible, hence more offensive to [Section] 8(a)(1) than generalized utterances by distant company officials." See also, *NLRB v. Dover Corp.*, 535 F.2d 1205, 1209 (10th Cir. 1976), cert. denied, 429 U.S. 978 (1976); *Seligman and Associates, Inc. v. NLRB*, 639 F.2d 307, 309 (6th Cir. 1981); *Caster Mold & Machine Co., Inc.*, 148 NLRB 1614, 1621 (1964).

Fourth, the foregoing rationale is not without application to Respondent's argument that Prock had been a newly appointed, low-level supervisor with no apparent authority to carry out closure of the Loves Park facility nor, so far as the evidence reveals, to select union supporters for layoff or discharge. That argument misses the point. As coating department supervisor, even a newly-appointed one, Prock would be perceived by employees as being in a position to be privy to information from higher management—information that likely would not be available to non-supervisory personnel. Given that situation, "Employees were entitled to assume that there was some basis in fact for [Prock's] statements" to them. *Gray Line of the Black Hills*, 321 NLRB 778, 792 (1996). And the friendship of Prock and Smith would make it seemingly more likely to the latter, as well as to Vineyard, that the former would be more willing to share such knowledge, about Respondent's intentions, and more likely to disclose accurate information gained from being privy to the intentions of Respondent's higher officials. Consequently, "warnings of Company retaliation . . . . from a familiar associate might be more credible," *NLRB v. Big Three Industries*, supra, to Smith and Vineyard because Prock—a supervisor, albeit a relatively newly-appointed, low-level one—seemingly would have greater access to higher management's intentions than would the two employees.

Fifth, Respondent's position is not aided by the facts that Smith had initiated the conversation and that Vineyard had not been a participant during the initial phase of it. As to the latter, a supervisor's remarks have no less a coercive affect upon employees who overhear them, than they do upon employees to whom such remarks are directed. See, *Frontier Hotel & Casino*, 323 NLRB 815 (1997), and cases cited therein. See also, *Perko's, Inc.*, 236 NLRB 884, fn. 2 (1978). In any event, though Vineyard overheard Prock's initial threat, that threat had been directed to Smith who, of course, was an employee within the meaning of Section 2(3) of the Act. Thus, the "overheard" defense is not so persuasive as Respondent seeks to portray, when the entirety of the situation is considered. Beyond that, as described above, Prock endorsed for Vineyard the earlier threat made to Smith, after Vineyard had intervened and questioned Prock's reason for having made the threat. Thus, not only had Prock become aware of what Vineyard had heard, but Prock effectively repeated the threat directly to Vineyard.

As to the undisputed fact that Smith had initiated the conversation, employee initiation of conversations does not provide a justification under the Act for unlawful statements, which supervisors choose to make during those ensuing conversations. See, *NLRB v. General Electric Co.*, 418 F.2d 736, 755 (2d Cir. 1969), cert. denied, 397 U.S. 965 (1970); *NLRB v. Randall P. Kane, Inc.*, 581 F.2d 215, 218 (9th Cir. 1978). Supervisors are not at liberty to use employee initiation of conversations as an open invitation to utter threats and other statements, which inherently interfere with, restrain, and coerce those employees in the exercise of their rights under Section 7 of the Act. Where a supervisor chooses to do so, she/he may not rely upon an employee's initiation of the conversation to escape the Act's prohibitions. *Rock-Tenn Co.*, 238 NLRB 403, 403 (1978).

Sixth, Respondent argues that the conversation did not occur in an office, but on the shop floor, and, in any event, can fairly be characterized as merely a "casual" one. To be sure, Respondent points in its brief to cases where the Board has agreed that supervisory statements about possible closure did not rise to the level of threats, in part because those statements had been made during conversations characterized as "casual." *Standard Products Co.*, 281 NLRB 141, 151 (1986) and *Gem Urethane Corp.*, 284 NLRB 1349, 1361 (1987). Still, neither case turned wholly upon the "casual" nature of the conversation at issue. Here, based upon Smith's above-quoted description, Prock had said only that it was her "opinion," rather than her "personal opinion." Such a distinction may seem like legerdemain, at first thought. But, the "personal opinion" conclusion reached in *Standard Products* was based significantly upon the subsidiary conclusion that the supervisor there was speaking "not as a spokesperson for management."

Here, while Prock said that it was her "opinion," according to Smith, the absence of any qualifier leaves the employee-listener uncertain as to whether the job loss warning is a personal view of Prock or, instead, a view based upon something said to Prock by higher management. That is, measured by the content of Prock's remarks, it cannot be said that an employee would naturally conclude that Prock had been expressing merely a personal opinion as opposed to an opinion informed by what she had heard from her superiors.

The holding of *Gem Urethane* is even less pertinent to the situation presented here. There, the statement had been made in an essentially social setting: during a ride home from work. Coupled with the employee's inability to "recall anything beyond [the supervisor's] reply or other surrounding circumstances," that factor led to the conclusion that the supervisor's statement had been "not made in an atmosphere of fear or coercion." That simply cannot be said to have been the situation in the instant case.

Rather than being made away from the workplace, Prock's job-loss warning was made on Respondent's plant floor, between aisles 3 and 4. True, that location was not an office setting. But, that distinction is relevant when evaluating interrogations, not threats. In attempting to draw such a distinction Respondent "confuse[s] the standards applicable to threats with those applicable to coercive interrogation." (Citation omitted.)

NLRB v. Champion Laboratories, Inc., 99 F.3d 223, (7th Cir. 1996). Respondent has cited no case holding that an alleged threat becomes less an unfair labor practice because made on the plant floor, instead of in an office.

It also should not escape notice that in *Champion Laboratories* the alleged threat had been but a supervisor's "impromptu paraphrase of what another . . . . worker had already said," and had been spoken, essentially "in bantering terms." Id. Nothing in any of the witnesses' description of Prock's statement to Smith and, then, to Vineyard can be characterized as "bantering." To the contrary, Prock testified that she had been concerned about job loss. Nor is there evidence that loss of jobs had been a subject of previous discussion at Respondent.

Seventh, Respondent argues that the conversation had amounted to no more than "legitimate arguments and discussions during a union campaign[.]" Certainly that might be said of Prock's above-quoted remarks about Vineyard's prospects for continued employment should the employees become unionized—a statement not alleged as a threat. Yet, in the circumstances, that cannot be said about a warning of potential job loss should the employees choose to become represented by the Union. Prock claimed that she had prefaced her job-loss statement with the qualifications if the Union "get[s] in and demand[s] too much," leaving Respondent "not . . . . able to do it and it could possibly close." But, Prock did not advance that explanation convincingly. It appeared to be nothing more than her own belated effort to extricate herself from the job-loss statement, which she actually had made.[15]

Vineyard made no mention of Prock having explained the reason for her job-loss threat. Smith, Respondent's own witness, testified that Prock had not said why she was saying, "we could all be looking for a job" if the employees chose representation by the Union. Accordingly, Prock's threat of job losses can hardly be characterized fairly as part of "legitimate arguments and discussions[.]" To do so would be to confer legitimacy on every threat by an employer regarding the consequences of unionization, regardless of the effects of those threats on the employees to whom made.

Certainly employers and their agents are allowed under the Act to make predictions about the consequences of unionization. Still, in doing so, such "prediction[s] must be carefully made on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond its control." *Schaumberg Hyundai, Inc.*, 318 NLRB 449, 450 (1995), citing *NLRB v. Gissel Packing Co.*, supra. However, that test is hardly satisfied by a warning of job loss, unaccompanied by any explanation for that warning. Nor, when made without the qualifications, which Prock appeared to be attempting to add when testifying, does her threat pertain to consequences beyond Respondent's control.

It should not escape notice that, once Vineyard had entered the conversation, it is undisputed that Prock had said that, even if the Union became the bargaining agent for Respondent's employees, they "would not get personal or sick days." That particular remark is not alleged in either complaint as a violation of the Act. Even so, in light of Respondent's "legitimacy" argument, its uncontroverted utterance should not merely escape notice.

"There is no more effective way to dissuade employees from voting for a collective-bargaining representative than to tell them that their votes for such a representative will avail them nothing." *The Trane Co. (Clarksville Mfg. Div.)*, 137 NLRB 1506, 1510 (1962). Such statements—even when applied to specific benefits sought by employees, rather than to complete unwillingness to enter into a collective-bargaining contract with a union—have a natural "effect of discouraging the organizational efforts of the employees," *Madison Industries, Inc.*, 290 NLRB 1226, 1230 (1988), because they convey to "employees that they [have] nothing to gain from supporting the Union," *American Telecommunications Corp.*, 249 NLRB 1135, 1138 (1980), and "constitute[ ] an unlawful expression to employees of the futility of selecting the Union as their collective-bargaining representative." *American Furniture Co.*, 293 NLRB 408, fn. 2 (1989).

The fact that Prock made those remarks, as part of a conversation during which she also threatened job loss if Respondent's employees became unionized, deprives whatever shred of force is left to Respondent's "legitimate arguments and discussions during a union campaign" argument. Prock's other remarks during that conversation were not all legitimate ones. Instead, her undisputed "would not get personal or sick days" statement naturally inhibited employees from selecting a bargaining representative and, accordingly, served to reinforce the natural deterrent to employees, in exercising their statutory right to freely choose whether or not to be represented, of her job -loss threat.

Finally, Respondent argues that Prock had been doing no more than expressing her own opinion about the consequences of its employees becoming represented. This factor has been touched upon above, in connection with Respondent's "casual conversation" defense. Still, it deserves independent consideration because it is advanced as an independent defense. As shown by *Standard Products Co.*, supra, "personal opinion" of a supervisor has been held to be one factor, which has been held to militate against a conclusion of unlawful threat. Yet, in other situations a supervisor's expression of "personal opinion" has been held insufficient to mitigate coercive effect. *Gray Line of the Black Hills*, supra; *L'Eggs Products Inc.*, supra, 236 NLRB at 388, and case cited therein.

As concluded above, there was nothing so plain about Prock's job-loss warning to Smith and, then, to Vineyard that it can be concluded that they would perceive her as voicing an opinion, which was truly "personal." Beyond that, while the Board has held that "generally, a supervisor may lawfully express his or her personal views of or experience with unionism," *Baddour, Inc.*, 281 NLRB 546, 548 (1986), it also has made clear that such expressions cannot be made without limitation: "the Act does not preclude a supervisor from expressing

[15] Of course, subjective or actual intent by a supervisor, for her statements to employees, is not determinative under Section 8(a)(1) of the Act. See, *Carry Co. of Illinois, Inc. v. NLRB*, 30 F.2d 922, 934 (7th Cir. 1994); *NLRB v. Puerto Rico Rayon Mills, Inc.*, 293 F.2d 941, 945–946 (1st Cir. 1961); *Waco, Inc.*, 273 NLRB 746, 748 (1984). "The test is *not* the actual intent of the speaker or the actual effect on the listener." *Smithers Tire*, 308 NLRB 72, 72 (1992).

opinions or pronouncing antipathy to unions *so long as the statements are not coercive*." (Footnote omitted; emphasis added.) *Wilker Bros. Co.*, 236 NLRB 1371, 1372 (1978).

A threat of job loss in the event of unionization, of course, is coercive, as discussed above. There is no evidence that Prock said anything to Smith or Vineyard from which it could be concluded that an employee would naturally have understood that, in uttering that warning, Prock had been merely engaging in personal speculation, as opposed to expressing a threat based upon information which she had learned by virtue of her relatively newly-acquired position as coating department supervisor. Viewing all of the foregoing considerations in their totality, they do not outweigh the coercive tendency that Prock's job-loss threat would naturally have on employees' exercise of their statutorily protected right to decide freely whether or not to become represented. Therefore, I conclude that, by Prock's statement that employees could lose their jobs if the Union came in, Respondent violated Section 8(a)(1) of the Act.

III. STATEMENTS ATTRIBUTED TO BETTY KRUEGER

Three violations of Section 8(a)(1) of the Act are alleged to have been committed by Shipping and Receiving Department Supervisor Betty Krueger, an admitted statutory supervisor and agent of Respondent: asking an employee if she had attended a union meeting, telling an employee not to associate with certain employees because the were engaging in union activities, and, on or about April 29, giving the impression that employees' union activities were under surveillance. That third allegation arises from events, which occurred in connection with the allegedly unlawful warning notice issued to Williams. Accordingly, it will be addressed in the succeeding section where the motivation for the warning notice is discussed.

As to the interrogation, paragraph 5(b) of the complaint in Case 33–CA–11725–1–2 alleges that the unlawful conduct was "ask[ing] an employee if she had attended a union meeting." But the brief filed on behalf of the General Counsel argues, in support of that particular allegation, in terms of creating the impression of surveillance, though no motion to amend the complaint's allegation has been made.

The facts upon which the interrogation allegation is based are relatively straightforward. Shipping and receiving department forklift operator Debbie Williams attended her first meeting sponsored by the Union on a Saturday during February. She testified that, on the following Monday, when she went into an office to pick up a glass list, Krueger had been there. Betty Krueger was Williams's immediate supervisor. According to Williams, Krueger said, "That she knew I went to the union meeting," and when Williams responded, "I thought it was our right to be able to do that," Krueger replied, "yes, it is," without saying anything else. Krueger denied having said that she understood that Williams had been to a union meeting.

As set forth in section I, and as discussed further below and in the succeeding section, Williams did not always appear to be testifying with candor. However, in connection with her description of Krueger's statement about having attended one of the Union's February meetings, Williams did seem to be testifying credibly. "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950). Furthermore, Krueger, herself, did not always appear to be testifying credibly. One point on which she appeared to be less than candid was her denial that she had made the statement to Williams that "she knew that [Williams] went to the union meeting[.]" Moreover, there are three objective considerations, which tend to support Williams's testimony that Krueger had made that remark.

First, Krueger admitted that she had been told by Mary Vogt—employee of Respondent who also worked at the V.F.W. Hall where the Union held at least some of its meetings with Respondent's employees—that Vogt had seen Williams at a union meeting: "I am not sure if that was a weekend that she told me at home, or whether it was a Monday morning." Thus, Krueger admittedly had been made aware of the fact that Williams had attended the Union's meeting. It also should not escape notice that Vogt seemingly had gone out of her way to report that fact to Krueger—during the "weekend" while Krueger had been at home or, alternatively, on the following "Monday morning."

Second, Williams and Krueger had worked together for a number of years during which they had developed a social relationship, attending the same functions during their nonwork time. Each one acknowledged having been a friend of the other during February. In consequence, it would not have been illogical for Krueger having received Vogt's report, to raise with Williams the subject of the latter's attendance at the union meeting. That becomes an even more natural occurrence in light of the final factor.

During the initial phase of the Union's campaign to organize Respondent's employees, Williams had been uncertain as to whether or not she wanted to support the Union. At one point she asked Krueger if it would be possible for her (Williams) to discuss the subject with someone from Respondent's personnel department. In fact, such a meeting was arranged for Williams with Employee Relations Supervisor Betty Ploplys, also an admitted statutory supervisor and agent of Respondent. Given the friendship of Williams and Krueger, and given the further fact that Krueger had been involved in arranging for Williams to meet with Ploplys to discuss unionization, it would not have been illogical for Krueger—having learned from Vogt that Williams had attended a union meeting—to comment to Williams on her attendance at that meeting.

In sum, I credit Williams's description of her Monday exchange with Krueger. Nevertheless, the issue remains as to whether that exchange constituted an interrogation and, then, as to whether it had violated the Act.

Obviously, the above-quoted description by Williams does not contain a question: "That she knew I went to the union meeting." Even so, as every attorney knows, there is more than one way to frame a statement so that, in reality, it constitutes a question. So, too, under the Act. See, e.g., *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1342 (5th Cir. 1980), cert. denied, 449 U.S. 886 (1980); *Gray Line of the Black Hills*, supra, 321 NLRB at 792–793. Krueger's statement obviously invited some response by Williams—one which either confirmed or denied the statement which Krueger made. Accord-

ingly, while not the conventionally encountered type of interrogation, Krueger's remark is no less essentially a question than would have been the fact had she asked directly whether Williams had attended the Union's meeting.

That does not necessarily make such a question an unfair labor practice, however. "To fall within the ambit of [section] 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference." *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980). See also, *Sioux Products, Inc. v. NLRB*, supra; *NLRB v. Champion Laboratories, Inc.*, supra. "We categorize as 'interrogations' within the meaning of [section] 8(a)(1) only those questions which, by word or context, suggest an element of coercion or interference."

To evaluate whether or not specific questioning is coercive or constitutes interference, a number of objective factors must be evaluated, see, e.g., *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *NLRB v. Rich's Precision Foundry,* 667 F.2d 613, 624 (7th Cir. 1981), no one of which is determinative. *NLRB v. Ajax Tool Works, Inc.*, 713 F.2d 1307, 1314 (7th Cir. 1983) (per curium). Accordingly, the inquiry to be conducted is a fact-intensive one.

Respondent identifies several factors which, it argues, negate any conclusion of coercion or interference: Williams and Krueger had a longstanding "amicable and friendly relationship"; their conversation during February had been a "casual" one; Krueger "is only an immediate, low-level supervisor, not a high-ranking company official"; and Krueger's inquiry had not been "a pressing inquiry," but had consisted merely of "isolated comments." Yet, just as "[f]riends can unlawfully threaten their friends," *NLRB v. Big Three Industries*, supra, so also can they seemingly coercively interrogate their friends. Moreover, it hardly is accurate to characterize Krueger's exchange with Williams as merely a "casual" one.

So far as the evidence discloses, the first thing that Krueger had said to Williams on that February Monday was that "she knew [Williams] went to the union meeting." Aside from Williams' response and Krueger's reply to it, there is no evidence that any other subject had been discussed, nor words exchanged. As a result, the entire exchange had pertained to Williams' attendance at the Union's meeting. Accordingly, it is difficult to characterize the subject as having been raised during the course of an otherwise casual conversation.

There is no evidence that, at the time of their February exchange, Williams had any idea of how Krueger could have learned that Williams had attended the union meeting on the preceding Saturday. Thus, although there is no allegation that an impression of surveillance had been created during this conversation, Krueger's remark would naturally give rise to concern in the mind of an employee as to how her supervisor could have learned about her attendance at a union meeting. For, such a statement reveals knowledge by an employer's agent which, in turn, implies that the employer may be "closely monitoring the degree and extent of [employees'] organizing efforts and activities." (Footnote omitted.) *United Charter Service*, 306 NLRB 150, 151 (1992). Consequently, the statement would naturally lead an employee to become apprehensive about continuing to pursue union activity. Furthermore, the fact that a low-level supervisor knew about that union activity, in the absence of any indication as to the source of that knowledge, would naturally lead an employee to fear that higher management might also be aware that the employee was engaging in statutorily protected activity—indeed, that it had been higher management personnel who had passed that information along to the employee's immediate supervisor.

Viewed from an employee's perspective, moreover, the subject of union meeting attendance had been one, which Krueger raised abruptly. That is, Williams had attended a union meeting on a Saturday and Krueger had raised the subject of that attendance on the very next workday. The timing of Krueger's statement, in relation to the day on which Williams had attended the Union's meeting, is a further factor, which would naturally add to an employee's apprehension. So, too, is the abruptness with which Krueger raised the subject. As pointed out above, that appears to have been the very first subject, which Krueger mentioned on that Monday, on her first encounter with Williams that day.

To be sure, the Monday conversation was of brief duration, Williams admitted that she had attended the Union's meeting, and, in effect, asserted her perceived right to do so. Yet, these factors are not so exculpatory as might appear at first blush. In the first place, since Williams effectively acknowledged having attended the meeting, there was not much more information for Krueger to obtain by prolonging her inquiry. Her first comment to Williams yielded confirmation of Vogt's report. Second, both as an objective matter and from her appearance when describing the Monday exchange, Williams seemed to have been caught off guard when told that Krueger knew about her attendance at the meeting. As a result, her response—"I thought it was our right to be able to do that"—appears to have been more reflexive, rather than an indication that she was not being intimidated by Krueger's revelation of knowledge and inquiry.

If anything, that response appears to be a defensive one, rather than the defiant assertion by an employee of a statutory right. As with Krueger's initial statement, Williams also appears to have been seeking confirmation by Krueger as to an employee's right to attend a meeting. Accordingly, Williams's response indicates concern about what was being said to her, instead of a lack of intimidation bred by Krueger's revelation of knowledge and inquiry.

Certainly, Krueger was a low-level supervisor. Still, no case has been cited which holds that low-level supervisors are incapable of coercively interrogating employees. Rather, that is but one indicium to be weighed in evaluating whether or not interrogation is coercive or interfered with employees' rights under Section 7 of the Act. Even taking into account the status of Krueger as a supervisor, as pointed out above, Williams had no way of knowing whether or not Krueger had obtained her knowledge from higher management and, if not, whether or not Krueger might communicate what she knew to higher management.

Prior to having attended the Union's meeting, Williams had discussed the Union with Ploplys and, as well, with Krueger. However, such discussion had involved the pros and cons of unionization. They were conducted to aid Williams in deter-

mining whether or not she wanted to support the Union. At no point prior to attending her first union meeting and to the following Monday, so far as the record discloses, did Williams actually make known to any of Respondent's agents that she had decided to support the Union. True, she later did begin openly supporting the Union. But, at the time of Krueger's question about Williams having attended the Union's February meeting, the latter cannot be said to have been its supporter, much less an open supporter of the Union. At that point, there is no evidence that Krueger had any independent knowledge as to Williams' union sympathies.

As pointed out above, Krueger effectively asked for confirmation that Williams had attended a union meeting in an office, not on the plant floor. At no point did Krueger inform Williams of the purpose for raising the subject of the latter's attendance at that meeting. Although one can speculate about Krueger's intention, no legitimate reason is provided by the record for Krueger to have revealed what she had learned and to seek confirmation from Williams.

It is accurate that Krueger made no other unlawful statements to Williams during their brief exchange. Even so, there has been no holding that a litany of unlawful statements must accompany an interrogation for it to be coercive. To be sure, Krueger did agree that Williams had a right to attend union meetings. Yet, significantly, at no point did Krueger assure Williams that no reprisals would be taken against the latter for having confirmed the report that she had attended the Union's meeting. Indeed, Krueger did not even inform Williams that the latter need not confirm or deny Krueger's announcement of knowledge that Williams had attended the union meeting.

Krueger was not a high-ranking official of Respondent. But, she was the immediate supervisor of Williams and, as such, possessed power over the latter's day-to-day work and the evaluation of it. On that Monday, Krueger sought to have a lone employee confirm or deny having attended a union meeting. No other subject was discussed. The exchange occurred in an office. The employee was not at that time a union activist. No purpose for asking for confirmation or denial was advanced to that employee. The employee was never informed that she was free to refrain from confirming or denying that she had attended the Union's meeting. The employee was not assured that there would be no reprisals for confirming that she had attended the union meeting. The employee reacted defensively, protesting that she believed that she had the right to attend a union meeting. Certainly, there have been more blatant instances of coercive interrogation disclosed by the cases. Yet, that is a question of degree. Here, a preponderance of the evidence establishes that an employee would naturally have been coerced by the totality of the circumstances in which Krueger interrogated Williams and, further, that such interrogation had a natural tendency to interfere with the exercise of rights guaranteed by the Act. Therefore, I conclude that the interrogation was coercive and violated Section 8(a)(1) of the Act.

A second violation of Section 8(a)(1) of the Act is that Krueger allegedly "told the employee not to associate with certain employees because they were engaging in Union activities." The basis for that allegation is somewhat obscured. Krueger's conduct is alleged to have occurred on an "unknown date in mid-February 1996[.]" However, Williams testified about several conversations during which Krueger supposedly had mentioned the Union: an occasion when Krueger "had told me one day to stay away from Cookie Quam because she was up on the line unionizing," other occasions when Krueger "just always told me about association, the people you associate with," and a day during November when employee Tom Camacho had been fired and Krueger purportedly had made an announcement "about the [U]nion being dead. They finally got rid of Tom Camacho. The [U]nion is dead now." In the brief filed on behalf of the General Counsel, moreover, there appears the assertion that, "Debbie Williams testified that Krueger frequently told her to step away from known union supporter Dan Lee (Tr. 245)." These situations raise issues well beyond what either complaint alleges.

In the first place, there is no testimony on page 245 of the transcript, which would support the above-recited quotation in the brief. That page does recite testimony by Williams that Krueger "always made comments about Dan Lee" and, further, that Krueger had regularly made "different comments to me about Dan scraping [duck] shit off the ceiling or off the roof," [16] adding, "That's where the [U]nion got him." At no point on that page of the transcript, nor elsewhere in William's testimony, is there an account by her that she had been "frequently told . . . . to stay away from known union supporter Dan Lee" by Krueger. Nor by any other supervisor or agent of Respondent. Krueger's derisive remarks—"That's where the [U]nion got him"—is not alleged as a violation and, in any event, seems to be akin to name-calling about a union and its supporters, which is neither unlawful nor objectionable conduct. See, e.g., *Salvation Army Residence*, 293 NLRB 944, 944 (1989), and cases cited therein.

Williams did testify that Krueger had made the remark about Camacho. But, those comments cannot fairly be characterized as telling an employee "not to associate with certain employees because they were engaging in union activities." Further, Williams placed those statements as having occurred during November of 1995, not during "late January or early February, 1996," as the complaint in Case 33–CA–11725–1–2 pleads. No motion to amend either complaint has been made to add those statements as an allegation. The Board has held that administrative law judges should not, in effect, amend complaints, even to add unpled statements admitted by a respondent's agent. *Medicine Bow Coal Co.*, 217 NLRB 931, fn. 2 (1975). And, in the final analysis, there is a larger problem with William's descriptions.

As pointed out above and in section I, Williams did not always appear to be testifying with candor. Whether Krueger's February interrogation led Williams to begin reading into remarks made on other occasions more than actually had been stated by Krueger or, as seems more likely, Williams sought to buttress the case against Respondent in connection with its

[16] Witnesses for both sides testified that during the fall of 1995, as had occurred during prior years, maintenance employee Lee had been assigned to refurbish and repair the plant's roof, as described without contradiction by Maintenance Supervisor Daniel Long, an admitted statutory supervisor and agent of Respondent.

motivation for her warning notice, her testimony regarding those other asserted statements by Krueger simply did not ring true as she was testifying. Her accounts were vague and ambiguous, contrasting sharply with her quite precise accounts of other events, such as being asked by Krueger for confirmation as to whether she had attended a union meeting.

That impression, formed as Williams testified, is confirmed by a review of the record of her testimony. For example, as quoted above, she claimed that Krueger "just always told me about association, the people you associate with," but was unable to provide even a single specific date for such a comment by Krueger. Moreover, she seemed unable to supply the circumstances in which even one of those asserted remarks had been made. Asked about Krueger's supposed statement about Quam, Williams testified, "I couldn't tell you if it was '95 or '96."

Krueger denied that she had made the comments about Quam and about Williams not associating with "people." Williams' testimony about those supposed remarks was not credible. There is no other credible evidence of Krueger having told any employee "not to associate with certain employees because they were engaging in union activities." Therefore, I shall dismiss that allegation.

IV. THE WARNING NOTICE ISSUED TO DEBBIE WILLIAMS

The discussion in the immediately preceding section forms a natural backdrop for analysis of the allegedly unlawfully motivated first written warning notice issued to Debbie Williams on April 30, though doing so at this point disturbs the strict chronological order of events. That warning notice states, in pertinent part, that Williams had been observed by two managers taking a morning break from 9:20 to 9:35 on April 29; that break times are ten minutes "AS REITERATED AT THE DEPARTMENT MEETING OF WEDNESDAY, APRIL 17, 1996"; that the length of Williams's morning break on April 29 violated that rule; and, that further violations could result in additional disciplinary action, including discharge. Pursuant to Respondent's usual procedure, the notice is signed by her supervisor, her manager, and a representative of industrial relations, in this instance Employee Relations Supervisor Ploplys. It was issued to Williams during a meeting on April 30 attended by Krueger, her supervisor, by Materials Manager Leonard J. Winkeler, an admitted statutory supervisor and agent of Respondent; and by then-head of the personnel department, Personnel Director Ken Judson.

None of the statements in the warning notice is inaccurate. On page nine of Respondent's handbook, distributed to all employees, is stated that employees receive "a ten-minute paid rest break in the morning and in the afternoon." At a department meeting conducted on April 17—which Williams and other shipping and receiving department employees, as well as their supervisor, Krueger, attended—Winkeler did reiterate the handbook rule that breaks were to be limited to ten minutes in duration. Williams admittedly did take a longer than the 10-minute morning break on April 29. She agreed that she had been observed doing so by Coating Manager Blanche Hutchison and by then-Sealing and Exhaust, and Salvage and Screen Manager Martha Ellen Bahling. Page 28 of the handbook states that Respondent "strives to use a uniform system of discipline" and provides for a "1ST WRITTEN WARNING" as the initial disciplinary step "[f]or most violations of Company rules and policies[.]" In short, on its face, the situation appears to be one where an employee properly was disciplined for concededly violating a work rule.

The General Counsel, however, alleges that the excessive break period had been no more than a pretext for issuing a warning notice to an employee because of her known support for the Union. As concluded in section V, infra, Respondent had unlawfully issued a warning notice, dated February 9, to maintenance employee Dan Lee. So, there is some basis for concluding that Respondent had not been reluctant to utilize its disciplinary procedure as a means of discriminating against the Union's supporters. Yet, there is more to consider with regard to the warning notice issued to Williams almost 3 months later.

By April 30 the Union's campaign had ended. As described in section I, the Union had requested withdrawal of its representation petition and that request had been approved over a week before the warning notice was issued to Williams. To be sure, retaliation for past union support is not an unheard of motivation for disciplining an employee, even though the union activity had concluded. See discussion, *American Petrofina Company of Texas*, 247 NLRB 183, 190 (1980). See also, *Human Resources Institute*, 268 NLRB 790, fn. 2 (1984) and *Dayton Hudson Department Store Co*., 324 NLRB 33 (1997) (concern with renewal of a union's campaign).

The record also reveals that Respondent had experienced an organizing campaign by a different labor organization sometime before the one conducted by the Union. Like the Union's campaign, that earlier campaign also had not resulted in selection of a bargaining agent by Respondent's employees. If nothing else, nevertheless, that overall sequence of successive union campaigns served to show Respondent that conclusion of an unsuccessful organizing campaign by one union did not mean that a future organizing campaign would not occur. Thus, beyond retaliation, employer discipline can be motivated by an intent to deter "any further employee activity aimed at changing working conditions." *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357 (4th Cir. 1969).

There are several factors present which do tend to support the allegation that the April 30 warning notice to Williams had been unlawfully motivated. She had become a supporter of the Union before its campaign had terminated. That support concededly had become known to Respondent's officials. As concluded in section III, she had been subjected to coercive interrogation by her immediate supervisor Betty Krueger. An unlawful warning notice had been issued to another supporter of the Union less than 3 months before the one issued to Williams. Even so, those facts are not conclusive evidence of unlawful motivation.

"If an employee provides an employer with sufficient cause for [discipline] by engaging in conduct for which he would have been [disciplined] in any event, and the employer [disciplines] him for that reason, the circumstance that the employer welcomed the opportunity to [discipline] does not make it discriminatory and therefore unlawful." (Footnote omitted.)

Klate Holt Co., 161 NLRB 1606, 1612 (1966). Obviously, in the context presented here, the operative or crucial phrase in that quotation is "the employer [disciplines] him for that reason[.]" Respondent argues that its warning notice had been motivated solely by the excessive break and would have issued to any employee, union supporter or not, in the circumstances. The testimony supporting that argument was provided by Materials Manager Winkeler, the immediate supervisor of Supervisor Krueger and, accordingly, the intermediate supervisor of Williams.

He had conducted the above-mentioned April 17 departmental meeting, discussed further below, during which the 10-minute restriction on breaks had been reiterated. It had been to him, following the morning break on April 29, that Coating Manager Hutchison reported having seen Williams taking a break in excess of 10 minutes, as also discussed further below.

After having been informed by Hutchison of William's excessively long morning break, Winkeler testified that he spoke with his immediate superior, then-Director of Manufacturing Dave Salamone, an admitted statutory supervisor and agent of Respondent during that period. Salamone did not appear as a witness, though Director of Operations Thomas D. Clinton, also an admitted statutory supervisor and agent of Respondent, testified that, as of the hearing, Salamone continued to work for Respondent as its director of sales. It had been during their conversation on April 29, according to Winkeler, that the decision had been made to issue a written warning notice to Williams. As to that decision, Winkeler testified, "we discussed what we needed to do and what I had, I had my mind made up that I felt it was, the violation required a written warning. And I discussed that with him and we agreed that that's the action I would take."

There is no inherent illogic to that account of the decision and the reasons underlying it. As discussed in section V, infra, however there also had been a logical appearance concerning the warning notice issued to Lee. But, as concluded in that section, when the surface plausibility of that reason is pierced by more careful examination of the evidence, it loses its plausibility and unlawful motivation is revealed. Of course, as set forth in section I, it is the actual motivation of the disciplining employer which is at issue where there are allegations of discriminatory motivation. As a result, it is to the evidence underlying Respondent's defense to Williams' warning notice that discussion must turn.

With respect to the sequence of events which assertedly led Winkeler to learn about the excessively long morning break of Williams on April 29, Winkeler testified that he had been told by Manager Hutchison that she and Bahling had seen Williams exceed the 10-minute limit during the latter's morning break that day. Both of those managers did testify to having been in the finishing or satellite cafeteria, on their own break, where Williams was taking her break. Both managers testified to having observed Williams take a break of more than 10-minutes.

Hutchison testified that, after having left the breakroom, "I looked up [William's] manager [Winkeler] and told him that she had been on extended break." Bahling testified that, "When I left the break area I ran into [William's] supervisor, Betty Krueger" and reported to Krueger having seen Williams taking more than 10 minutes for break. Krueger agreed that she had received that report from Bahling. Both Winkeler and Bahling testified that, later that day, he had talked to her about Hutchison's report and that she had confirmed having seen Williams taking an excessively long break that morning.

After Winkeler spoke with Salamone and they made the decision to issue the warning notice to Williams, he informed Krueger that he intended to do so. As set forth above, on the following day the warning notice was issued to Williams during a meeting with Krueger, Winkeler, and Judson. There is nothing inherently illogical about the foregoing sequence of events provided by Respondent's officials. Still, the General Counsel has adduced evidence, which facially might appear to undermine Respondent's defense concerning the motivation for the warning notice.

First, there is evidence that prior to April 20 Respondent had been tolerating morning and afternoon breaks, which exceeded 10 minutes in length. For example, former salvage department and coating department employee Mark McIntire and, also, former salvage department and coating department employee Nora St. Germain each testified to having been allowed to leave a minute early for breaks and to having been allowed to return a minute late from breaks, thereby enabling employees to spend a full ten minutes on their breaks. Holly Vineyard testified that coating department employees had been taking 15 and sometimes 20-minute breaks. And Williams testified not only that shipping and warehouse employees ordinarily took 15-minute breaks, but also that supervisors, specifically Krueger, had been aware of those excessively long breaks and had told employees that they could take them. Indeed, Krueger conceded that employees "tend to backslide" with regard to break lengths.

One indicium of unlawful motivation is treatment of union supporters differently than has been the treatment accorded ordinarily to other employees. "Proof of discriminatory motive is critical, although it can in some situations by inferred from the mere fact of differences in treatment." (Citation omitted.) *Teamsters v. United States*, 431 U.S. 324, 335, fn. 15 (1977). "Illegal motive has been held supported by . . . . variance from the employer's 'normal employment routine.'" *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75 (8th Cir. 1969). Nonetheless, there is one fact here, which precludes the testimony recounted in the preceding paragraph from supplying meaningful evidence of inconsistent treatment of Williams.

On April 17, almost 2 weeks before Williams was observed taking her excessively long morning break, Winkeler had conducted a departmental meeting, admittedly attended by Williams, during which he specifically reminded the assembled employees to confine their breaks to no more than ten minutes in length. In other words, whatever had been the practice being allowed with regard to break lengths prior to April 17, Winkeler had told Williams and the other assembled employees on April 17 to observe the length of breaks as specified in the handbook. Certainly, there is nothing unlawful under the Act in discontinuing a practice of toleration of excessively long breaks. There is no principle requiring that "misconduct once tolerated at all must be tolerated forever." *NLRB v. Eldorado Mfg. Corp.*, 660 F.2d 1207, 1214 (7th Cir. 1981). See also,

Washington Materials, Inc. v. NLRB, 803 F.2d 1333, 1340 (4th Cir. 1986).

Nevertheless, there also is evidence of two other facts, which, in other circumstances, might cast doubt upon the weight to be accorded to Winkeler's April 17 reiteration of the rule, as a legitimate defense. The first is that there were seeming discrepancies in the accounts of Respondent's witnesses as to what had led Winkeler to make that reiteration.

Respondent's managers attempt to conduct departmental meetings on a monthly basis, subject to business needs. Winkeler testified that, before such meetings, he had always asked Supervisor Krueger "if there's anything that she would like me to bring up," and, further, that before the April 17 departmental meeting, "she requested for me to just review with them and point out to them that, to, that breaks are ten minutes long and she felt that some people may have been abusing it and asked me that I review that, which I did." Krueger agreed that she had "told him, yes. I told him that" she desired to have the subject of breaks discussed during that April 17 meeting.

Manager Bahling, however, testified that, during a meeting with managers prior to April 17, then-Director of Manufacturing Salamone had instructed the managers that he "wanted each one of us to bring up in our meetings that breaks were ten minutes. We all were told to do [that] and we did." Neither Winkeler nor Krueger made reference to such an instruction by Salamone. Even so, their account of how the subject of break-lengths had come to be raised on April 17 is not necessarily contradictory of Bahling's testimony. As an objective matter, Salamone could have issued his directive. Winkeler could have asked Krueger if there was anything she wanted to have discussed. And she could have mentioned the length of breaks, without adding that the subject was one which Salamone had directed the managers to raise during their departmental meetings.

It must not be overlooked that the General Counsel's discriminatory motivation allegation, for William's warning notice, is neither enhanced nor diminished even assuming that there is a direct contradiction among Respondent's witnesses as to what led Winkeler to reiterate the break-length rule on April 17. However he came to do so, there is no dispute that Winkeler had reiterated the rule during the departmental meeting that day. There is no allegation that, in doing so, Respondent had somehow violated the Act. "An employer's decision to enforce its rules more stringently in the future is within its discretion and does not suggest discriminatory treatment." (Citation omitted.) *Camvec International*, 288 NLRB 816, 821 (1988). Certainly there is no basis for inferring that it had been Williams to whom Winkeler had truly been aiming his April 17 statements about breaks. Nor can it be inferred that, in reiterating the rule, he had somehow anticipated that Williams, alone of all the assembled employees, would choose to thereafter disregard the rule. Accordingly, the important fact is that Winkeler did make the announcement and Williams admittedly had heard him say it.

The other factor which might case doubt upon the weight to be accorded Winkeler's April 17 reiteration of the rule, as an element of Respondent's defense, is evidence that reiteration of the break-length rule had been made at previous department, perhaps commonly, but employees had continued disregarding the rule after those previous meetings. For example, Williams testified that, during past departmental meetings, Winkeler had "said be careful of your ten minute break," and that he had "always said that." Similarly, Coating Department Manager Hutchison explained that "we remind them at different times, you know, hey, breaks are getting a little bit out of hand. You get a ten minute break in the morning, you get a ten minute break in the afternoon."

Of course, absent any other evidence, that testimony would diminish considerably, if not obliterate altogether, the weight to be accorded Winkeler's April 17 reiteration of the rule. But, there is evidence of additional facts, which distinguish Winkeler's April 17 reiteration from ones made by him at past departmental meetings—and, in the process, which also further illustrates the unreliability of Williams.

At that April 17 departmental meeting, testified Winkeler, "I remember distinctly . . . . that . . . . Betty [Artz], who was sitting off to my left . . . . said, well, ... I've always been taking fifteen minute breaks." According to Winkeler, "I said, wait a minute, Betty. The handbook says ten minutes and effective immediately it is ten minutes, no matter what other breaks we've been doing . . . ." Williams was confronted with questions about this April 17 exchange. In the end, she never truly disputed that it had occurred. But, she claimed that she lacked recollection as to whether or not the exchange between Winkeler and Artz had taken place. And she did so in quite unconvincing fashion:

> Q. And wasn't there a worker who asked, well, we've been getting 15 minutes, Mr. Wink[e]ler? Did you say [sic] a lady say from the—who was in that meeting we've been taking 15 minutes—
> A. I don't remember.
> Q. —and now you're going to cut us back to ten?
> A. I don't remember that.
> Q. Do you deny that she said it?
> A. I'm not denying it, because I don't remember it.
> Q. Do you know a person named Betty Art[z]?
> A. Yes.
> Q. Did you hear Ms. Art[z] say that?
> A. I don't remember.
> Q. You don't remember whether it was her or you don't remember the question?
> A. I don't remember if anyone said anything like that.
> Q. But you don't deny that they might have said that?
> A. They could have said it, yes.

Winkeler appeared to be testifying truthfully about his April 17 exchange with Artz. That exchange distinguishes what he said during that particular departmental meeting from what he might have said about break lengths during prior departmental meetings. For, on April 17 he was confronted with the specific fact that employees had been taking 15-minute breaks and he specifically instructed the employees to stop doing so. Moreover, despite her above-quoted seeming evasions, I am convinced that Williams had heard the exchange and had understood Winkeler's instruction. Nonetheless, thereafter she chose

to simply ignore what she had been told and continued taking 15-minute breaks. On April 29 she was caught doing so.

In sum, whatever past disregard of prescribed break lengths had taken place and whatever past tolerance Respondent had shown of that practice, there is no basis for concluding that Respondent's unwillingness to tolerate an excessively long morning break by Williams on April 29 had displayed a variance from what had become normal routine. Winkeler's April 17 reiteration of the rule, accompanied by his exchange with Artz, left no room for continued disregard of the rule and, consequently, obliterates any argument that issuance of the warning notice to Williams on April 30 had represented inconsistent treatment. The fact that Respondent had tolerated excessive break lengths prior to April 17 did not oblige it to continue doing so thereafter, *NLRB v. Eldorado Mfg. Co.*, supra, and the April 17 exchange between Winkeler and Artz had made plain to all of the assembled employees, including Williams, that the practice of excessive break lengths no longer would be tolerated.

The second area in which evidence has been adduced which appears to undermine Respondent's defense is testimony by Williams concerning certain April 29 statements by Krueger. While on her break that morning, Krueger had been carrying a brown supermarket-type bag. According to Williams, following the break, she had been "working in the warehouse" when Krueger approached and asked if the truck parked behind the cafeteria was assigned to Williams. Williams said that it was not.

Following some further inconsequential conversation, according to Williams, Krueger "said that I had a brown bag that I had taken to break. She wanted to know what the brown bag was," and "I told her it was my personal stuff." Then, Williams testified, "She asked me, she told me that I had a list that I was showing people in the cafeteria and they were looking at it or something." After it dawned on her what Krueger was talking about, testified Williams, she explained to Krueger that it was an address list for her son's graduation and "took it out and showed it to her."

According to Williams, after looking at the list, Krueger "just handed it back to me. And then she wrote something down—the paper. But then she said according to Williams, after looking at the list, Krueger "just handed it back to me. And then she wrote something down—the paper. But then she said that Blanche Hutchison and Ellen Bahling had seen me take a 15-minute break. And I said, yeah." "I didn't think anything about it," Williams testified, "I started to drive away and then I stopped her and asked her was there a problem with my 15 minute break. And she said that, well, you know what's been going on at Amrock [sic]."[17] Williams testified that she had been puzzled by that remark:

> I didn't understand it because that's not what, I just asked her about my break. And she said, I asked her, well, what do you, what do you mean about, what are you talking about with Amrock [sic] And she said, well, they are trying to get a union in there. And I looked at her and I said, well, what's that go to do with me? Williams testified that Krueger said nothing further—"we just dropped it"—and the conversation concluded.

Krueger denied having said anything to Williams about Amerock and, also, having said did Williams know that employees were trying to get a union into Amerock. As to what she had said to Williams, Krueger testified, "I told her what Ellen Bahling had told me, that she had extended her break. And yes. I did talk to her about it. I did say to her, I did tell her that she had taken a long break," and, further, "I told her that I knew that she—that Ellen had told me that she had been there for over ten minutes, more like 15, or even beyond."

Krueger agreed that she had mentioned the brown bag to Williams: "I told her that Ellen had mentioned about this brown bag in the work area. And I asked her if she would mind telling me what was in it." Although Krueger never denied expressly having asked Williams about a list, she did testify that she did not believe that she had been told by Bahling that Williams had produced a piece of paper while in the cafeteria on morning break. Asked if she had mentioned a list to Krueger, while speaking to Krueger on April 29, an obviously puzzled Bahling answered, "A list? No," and then testified, "We did not talk about a list."

The General Counsel places somewhat heavy reliance upon the brown bag and list in support of an allegation that, on April 29, Respondent "created an impression among its employees that their union activities were under surveillance." Yet, there is no evidence that brown bags had been involved in the Union's organizing campaign among Respondent's employees. Nor is there evidence that brown bags had played any part in the organizing campaign at Respondent, which had preceded the one conducted by the Union. Further, there is no evidence that brown bags had been a feature of an organizing campaign at Amerock, nor in any other organizing campaign conducted in the Rockford area. There is no evidence that any of Respondent's employees, including Williams, had perceived brown bags as somehow associated with union support or activity. And no cases have been cited in which brown bags were an aspect of union activities by employees. Even if a few such cases do exist, there is no basis for concluding that, during the Board's history, brown bags have been ordinarily associated with organizing campaigns.

In sum, there is no basis for inferring that Krueger's admitted question about what was in the brown bag would naturally lead an employee to conclude that Respondent was "closely monitoring the degree and extent of [her] statutorily protected efforts and activities." *United Charter Service*, supra. In fact, by April 29 there had been approval of the withdrawal of the Union's representation petition and there is no evidence whatsoever that any organizing activity continued at Respondent. Moreover, there is no evidence that an employee would naturally have concluded that Hutchison and Bahling's presence in the satellite cafeteria during the morning of April 29 had meant anything other than that they were taking their breaks there. Of course, as discussed above, conclusion of the Union's organiz-

[17] Though there is only scant evidence concerning it in the record, Krueger testified that Amerock "is a big corporation" located "on the west side of Rockford" where another labor organization had unsuccessfully conducted an organizing campaign.

ing campaign would not necessarily preclude an employer's discriminatory motivation. However, that fact, coupled with the absence of any evidence of some other form of statutorily protected activity in progress, would diminish, if not altogether obliterate, a reasonable perception by an employee that Krueger's question about the bag somehow pertained to activity protected by the Act.

Beyond that, Krueger's inquiry about the brown bag appears to have been the product of nothing more than simple curiosity. Bahling testified that she had observed Williams carrying the bag during the morning break on April 29 and, further, had mentioned it to Krueger, "Just as a matter of the conversation. We're conversation [sic] and I'm telling her about the over stay of the break. I said she had a large brown, like a shopping bag with her." Krueger testified that, in the past, she had only observed Williams carrying "like a folder that she carried bowling papers in"—"I think it was green," she testified, and similar to, "but thinner" than the accordion-type folder displayed to her during the hearing. Accordingly, there was an inherent logic to Krueger's explanation for having raised the subject of the brown bag with Williams and having asked what was in it.

Williams did testify that she had carried brown shopping bags at "certain times" in the past at Respondent, whenever "I have to go to the bathroom or if I feel I might need to go to the bathroom, I have the bag with me." Even if true, Williams never claimed that either Bahling or Krueger had seen her carrying such a bag prior to April 29. And Krueger denied having been aware that Williams had carried around a brown bag on occasion. Thus, there is no basis for concluding that there had not been a logical reason for either Bahling or Krueger to take note of the brown bag being carried by Williams while on break during the morning of April 29.

As quoted above, William's claimed that, in addition to the brown bag she had been asked by Krueger about the list. Even if true, that would not have been a naturally perceived reference to something connected with a union. Williams testified that she had run "two different" football pools at Respondent during 1995 and had taken orders for "Girl Scout cookies [and] Market days," a food sale program from which local schools derive financial benefit. Presumably, such conduct involved recording on paper the people who participated and the particulars of their participation. So, it would not have been all that unusual for Williams to display lists. In these circumstances, even if Williams had brandished a list during her April 29 morning break and even if Krueger had inquired about it, there is no logical basis for concluding that an employee would naturally have connected such an inquiry to union activities, especially as the Union's campaign had terminated by April 29.

In any event, like the supposed Amerock-related statements, which Krueger expressly denied having made to Williams, it appeared to me that the purported "list" related remarks which Williams described was testimony by Williams created out of the whole cloth. It should not escape notice that, having heard Winkeler's reiteration of the break-length rule less than two weeks earlier, as well as his exchange with Artz, it would have made no sense on April 29 for Williams, as she claimed, to have asked Krueger if there was "a problem with my 15 minute break." I think she well knew that length of her break was a problem and constructed a conversation containing comments by Krueger, which might absolve her (Williams) from the warning notice which she eventually received on the following day. That is, it appeared that Williams attributed those April 29 remarks to Krueger to make it seem that the warning notice had been unlawfully motivated. Therefore, I do not credit her testimony about Krueger asking about the list and making statements about Amerock. Further, I conclude that the evidence concerning Krueger's inquiry about the brown bag does not establish an impression of surveillance. In these circumstances, the evidence does not support the April 29 impression of surveillance allegation and I shall recommend that it be dismissed.

Shorn of any direct evidence of unlawful motivation for William's April 30 warning notice, the record is left with evidence that, at best, could only support an inference of such motivation. A third area in which evidence has been adduced which might undermine Respondent's defense, and also supply an inference of unlawful motivation, involves the quantum of the penalty imposed upon Williams—a written warning notice—in light of the seeming insignificance of the offense committed, overstaying a break on a single occasion. To be sure, the Board and its administrative law judges are not free to substitute their business judgment for that of respondents. See, e.g., *Douglas Aircraft Co.*, 308 NLRB 1217, 1224 (1992). Nevertheless, "if the employee is a good worker and his breach of the work rules trivial, the more rational explanation for the [discipline] may be invidious motivation." *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977). See also, *Electric-Flex Co. v. NLRB*, 570 F.2d 1327, 1332 (7th Cir. 1978); *NLRB v. Florida Medical Center, Inc.*, 576 F.2d 666, 672 (5th Cir. 1978).

As set forth above, the first step in Respondent's stated disciplinary procedure is a first written warning notice. Still, there is some basis for finding that verbal warnings have been a more usual past disciplinary measure for overstaying a break, at least for a first discovered infraction. But, as Winkeler explained, more was involved here than merely an extended break.

He testified that, "I made a decision and got a concurrence from Mr. Salamone" that a written warning should issue to Williams. His reason for that disciplinary measure, testified Winkeler, had been "that I made it clear, perfectly clear the week before or two weeks before [that breaks were limited to ten minutes] and that she went and did it [took an extended break] in front of two managers. It was blatant." Obviously, there is a basis for such a conclusion: Williams had attended the April 17 departmental meeting and I am convinced that she heard the Winkeler's exchange with Artz; she took an extended break during the morning of April 29; and, she did so notwithstanding the fact that she knew that two managers were present in the finishing or satellite cafeteria. Clearly, "blatant" is an apt characterization of her conduct, viewed from an objective perspective. Indeed, insubordination may be an even more accurate one.

Beyond that, it should not be overlooked that overstaying a break is not so trivial an offense, in the circumstances of Respondent's operations, as might be the fact in some other situations. General Counsel's witness Vineyard explained that, because breaks are staggered, employees returning late from breaks cut into the length of breaks which employees, sched-

uled for succeeding breaks, have available to them for break: "I had told [Supervisor Prock] that there were some people who were coming back late from their break, making my break shorter, making it difficult for everybody to get bathroom breaks." Thus, there is support for Winkeler's testimony that the 10-minute break rule is "as important as any other rule, if you ask me." And there is no basis for concluding that issuance of a first written warning notice, the stated first step in Respondent's disciplinary procedure, had been disproportionate discipline for the offense committed by Williams during the morning of April 29.

A fourth consideration with respect to Respondent's defense are the roles played by various supervisory officials in what, after all, is no more than simply the issuance of a warning notice to an employee. For example, there is some evidence that ordinarily it is a supervisor, not a manager, who makes decisions concerning issuance of warning notices to Respondent's employees. But, here it had been Winkeler who had made the decision to issue the first written warning notice to Williams on April 29. Still, Krueger testified that before she disciplined an employee, she ordinarily "had to contact my manager," as well as the personnel department. Winkeler corroborated that testimony by Krueger, explaining that when discipline is meted out to an employee in his department, usually the supervisor comes to him and the discipline occurs only "with my concurrence." Accordingly, Winkeler's involvement in discipline of Williams was not so extraordinary as otherwise might be the fact.

Beyond that, it had been to Winkeler that Hutchison had reported the excessive break taken by Williams. And it had been Winkeler who had reiterated the break-length rule on April 17 and who had specifically cautioned Artz, and the other assembled employees, including Williams, that 15-minute breaks would not be tolerated. In a meaningful sense, therefore, it had been Winkeler's own direction that Williams had disregarded. Viewed in that light, his involvement in the disciplinary decision is not all that extraordinary. Certainly there is no evidence that managers have never disciplined employees of Respondent.

To be sure, neither of the managers who had observed Williams in the cafeteria on April 29 had said anything to her about the excessively long break which she was taking. Beyond that, neither of them was the manager who issued the warning notice to Williams, although they had been the ones who had witnessed her infraction of the rule. However, with regard to not having said anything to Williams during the course of the break, Bahling testified, "That's not our job," because, "If we see something wrong, another worker in another area we will report it to the manager or the supervisor of that person, but we don't take it upon our self to counsel the person." "I think it's called the chain of command," she testified when questioned further about the subject. Obviously that testimony applies with equal force to any question regarding why neither Hutchison nor Bahling had been the official who issued the written warning to Williams. Neither was the intermediate supervisor of Williams; that supervisor was Winkeler.

It is accurate that while Employee Relations Supervisor Ploplys had signed the warning notice, it had been her superior, Judson, who had attended the meeting during which the warning notice was issued to Williams. Yet, all of Respondent's officials, who appeared as witnesses and who were questioned about the subject, testified that someone from the personnel department approves discipline decisions before they are implemented. And someone from that same department sits in whenever the discipline is administered to the employee.

It is undisputed that by April Respondent was beginning to experience the affects of a business downturn and was in the process of downsizing its personnel complement. As a result, Ploplys testified, "at that time, I was meeting with all of the people and supervisors, that were giving me the names of people that wanted the layoff," with the result that she was too busy with other duties to attend the meeting with Williams: "I was all over the plant, meeting with people." So, Judson replaced her during the meeting with Williams. That testimony by Ploplys is logical. It was not contradicted by any other testimony, nor is it contrary to any other evidence adduced by the parties. As a result, Judson's participation in the April 30 disciplinary meeting is not a factor, which detracts from Respondent's defense.

What does appear unusual, at least based upon the evidence adduced, is that Winkeler chose to discuss William's infraction with then-Director of Manufacturing Salamone before making the final decision to issue a warning notice to her. There is no evidence that a manager contemplating disciplining an employee ordinarily would confer first with the director of manufacturing about the subject. Nevertheless, it would be difficult to conclude that a false defense is shown merely on the basis of that single fact, much less to also infer unlawful motivation from it.

It is hardly uncommon in human affairs for people to talk over proposed courses of action with someone else; if for no other reason than to hear the logic of what is planned by thinking out loud about it. Further, as he testified, Winkeler appeared to have been particularly perturbed at learning, on April 29, that Williams had chosen to disregard an instruction which he had given her and other employees less than two weeks earlier. It would not be particularly surprising for someone in his position to, in effect, let off steam by expressing that perturbation to someone else, such as Salamone.

Beyond that, it should not be overlooked that Winkeler admittedly knew that Williams had been one of the Union's supporters. By April 29 the Union's campaign had concluded, but both unfair labor practice charges had been filed and those charges remained pending matters. Viewed from Respondent's perspective, it was not unlikely that another charge would be forthcoming should a warning notice be issued to Williams. In such circumstances, it would not be illogical for a manager to confer with his superior, with whom he might not ordinarily confer, before disciplining Williams, to try to confirm that his lawfully motivated action would not leave Respondent vulnerable to an allegation of an unfair labor practice—that is, to "prepare[e] for a possible unfair labor practice charge . . . ." *Mac Tools, Inc.*, 271 NLRB 254, 255 (1984). No less applicable to this type of situation, arising under the Act, is the reasoning expressed more recently in an age discrimination setting: "No inference of guilt can be drawn from awareness of one's legal obligations; to do so would be to promote the ostrich over

the farther-seeing species." *Partington v. Broyhill Furniture Industries, Inc.*, 999 F.2d 269, 271 (7th Cir. 1993).

Finally, Director of Operations Thomas Clinton acknowledged that he had been spoken to by Salamone and Winkeler about their intention to issue the warning notice to Williams: "They come [sic] up to me, talked to me, asked me, explained the situation and I agreed with it." Clinton claimed that it was not unusual for such conversations to occur and that his subordinates commonly discussed with him their intentions to issue warning notices to employees under his ultimate supervision. True, he was not able to "recall" a single instance of such prior discussions. Still, he appeared to be testifying credibly about those prior discussions. And even if there never had been such a prior conversation—even if Clinton was gilding the lily—the reasoning in the immediately foregoing paragraph applies with no less force to Salamone and Winkeler's advance notice to Thomas Clinton, than it does to Winkeler's conversation with Salamone. After all, were Respondent disposed to avoid possible litigation over a clear violation of one of its rules, Clinton presumably was the logical official to make such a tactical decision which, in the final analysis, would be viewed as a condonation.

In sum, Respondent's evidence underlying its defense to William's warning notice is logical and has been presented by witnesses who were credible. Whatever past infraction of the break-length rule had been tolerated was negated by Winkeler's April 17 remarks to Williams and to other assembled employees. While Williams had been the target of unlawful interrogation approximately 2 months earlier and had become a known supporter of the Union, Supervisor Krueger—who engaged in that unlawful interrogation—was not involved in the actual decision to issue the first written warning notice to Williams. Nor, given William's lack of candor, is there any direct evidence of unlawful motivation for issuance of the warning notice to her. She did violate the rule. Two managers caught her doing so. No evidence of unlawful motivation can be inferred from the sequence of events that led to the decision to issue a first written warning notice to Williams. Therefore, I conclude that a preponderance of the credible evidence does not support a conclusion of unlawful motivation and I shall recommend that the allegation pertaining to William's warning notice be dismissed

V. THE WARNING NOTICE ISSUED TO DAN LEE

A contrary result has been shown to be warranted with respect to the first written warning notice dated February 9, and issued to Dan Lee on February 12. That warning notice states, in pertinent part, "Complaints have been brought to our attention that you violated the solicitation policy on page 27—policy 2 of the Company handbook." That section of Respondent's handbook reads, "All solicitations is [sic] prohibited except when both the person doing the soliciting and the person being solicited are on break, on meal time, or otherwise are properly not engaged in performing their work tasks."

Paragraph 6(c) of the complaint in Case 33–CA–11536 recites that rule. Then, paragraph 8 of that complaint pleads that, "By the conduct described above in paragraph 6, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. However, no argument is advanced in support of the allegation that the rule, itself, violates the Act. On its face, the rule does no more that prohibit solicitation whenever either employee—solicitor or solicitee—is working. A no-solicitation rule is lawful so long as its prohibition is confined to "periods when employees are performing actual job duties, periods which do not include that employee's own time such as lunch and break periods." *Our Way, Inc.*, 268 NLRB 394, 395 (1983). As published, Respondent's rule specifically excludes break and "meal times," as well as times when employees "otherwise are properly not engaged in performing their work tasks," from the breadth of its proscription. Consequently, Respondent's no-solicitation rule is not overly bread and, as published, does not violate the Act for any reason.

In view of that conclusion, there is no basis for concluding that the February warning notice issued to Lee had been based upon an unlawfully broad no-solicitation rule. Nevertheless, the evidence shows that the rule had been relied upon as the basis for issuing a first written warning notice to Lee. In consequence, the issue becomes whether violation of the rule had been the sole motivation for issuing that warning notice to Lee or, alternatively, whether the rule had been utilized as a pretext for retaliating against Lee because of his union activity or as a means of deterring other activity by Lee which is protected by the Act.

Lee had begun working for Respondent during late 1977. He worked in the maintenance department. By 1996 he had become subject to the immediate supervision of Maintenance Supervisor Daniel Long, an admitted statutory supervisor and agent of Respondent, and to the intermediate supervision of Manager John Errico. Respondent concedes that Lee had been a supporter of the Union and, further, that it had been aware of Lee's support for the Union by the time that it issued the first written warning notice to him.

It also is uncontroverted that on Monday, February 5, Lee had left the maintenance department and had gone to the yoke pinning department where he engaged in a conversation with at least one of the yoke pinners, Leonard Thomas Walsh, about the Union. It is that exchange with Walsh which is the assertedly sole basis for issuance of the warning notice to Lee on the following Monday, February 12. As described above, Respondent has a valid rule, which prohibits employees from soliciting when either the solicitor or solicitee is working. Lee claimed that, when he had spoken with Walsh on February 5, he had thought that Walsh had been on break. Walsh denied that he had been on break at that time and testified that he had been working.

As discussed in section I, in evaluating an allegation of discrimination, the ultimate issue is the actual motivation for the assertedly unlawful action. More specifically, at issue is the actual motivation of the official or officials who made the decision to take an allegedly unlawful action. *Advanced Installations, Inc.*, 257 NLRB 845, 854 (1981), enfd. mem., 698 F.2d 1231 (9th Cir. 1982). "The state of mind of the company officials who made the decision . . . . reflects the company's motive for" discipline. *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d

332, 336 (5th Cir. 1980). As to that issue, however, the record is not altogether clear as to exactly who had made the decision to issue the warning notice to Lee.

The notice is signed by Operations Manager Thomas Clinton, by employee relations supervisor Ploplys and by maintenance supervisor Long. Long testified that, during the morning of Friday, February 9, he had been summoned to the personnel department where he met Director of Personnel Judson, Supervisor Ploplys and Dayton Larson, the manager of the yoke pinning department. Only Long described with specificity what had occurred during that meeting.

According to him, Judson said that another worker had filed a complaint against Lee with Prefinishing and Yoke Pinning Supervisor Emma Hall: "He said that Dayton Larson had come to him with a complaint that one of . . . . Emma Hall's employees at that time was being solicited and had a complaint about it, he'd filed a formal complaint." Long testified that Judson further said that the employee, who was not named during that meeting, had reported "that Dan Lee had been in the [yoke pinning] department" where he solicited the unnamed employee and that the latter "had gotten upset with [Lee] and came through Emma to Dayton and registered a complaint that he did not want to be bothered at his work station when he was working."

"We had talked about, we'd talked about and decided at the time that we should give [Lee] a written warning," testified Long, because, "we had had some problems with Dan Lee walking throughout the plant. I'd had complaints from three different managers at the time about him being in their area, talking and bothering employees. And also we [now] had a formal complaint at the same time from another employee that we thought was very serious." The three managers identified by Long were Bahling, Hutchison, and then-manager of Coating, Dave Coke. Coke did not appear as a witness. Still, Bahling and Hutchison were called as witnesses and both testified to having complained, during early 1996, about Lee having wandered into their departments and having engaged in conversation with employees working there. But, those earlier instances are not dispositive of Respondent's motivation for having decided to issue the first written warning notice to Lee during February. For, "an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee." *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989). See also, *Douglas Aircraft Co.*, 308 NLRB 1217, 1221 (1992), and cases cited therein.

Long advanced internally contradictory testimony, with respect to who had actually made the decision to issue the warning notice to Lee. At one point Long testified, "The decision was made by me. I believe it would normally be my decision. It was a first written warning." Yet, at other points Long contradicted that testimony, claiming that, no, he had not actually made the decision, but had merely made a "suggestion" that Lee receive a warning notice: "It was my suggestion and this is what happened." If true, however, that latter testimony leaves up in the air who had been the actual decision-maker. That uncertainty is not clarified by other testimony given by Long in connection with the decision to issue a warning notice to Lee: "we'd talked about and decided at the time that we should give him a written warning," and, "We made that decision on the fact that we had had some problems with Dan Lee walking throughout the plant."

According to Long, It had been Judson's idea "that we would have to talk about" disciplining Lee, after which he and Judson "conferred back and forth with one another" and "Judson consulted with our counsel on whether this was the appropriate action to take." Of course, as set forth in section IV, there is nothing inherently wrongful about consulting with counsel about a decision to discipline a union supporter. Still, from this particular portion of Long's testimony, it would appear that Judson had either made the decision to discipline Lee or, at least, had participated in making it or, at least, had suggested that Lee be disciplined. But Judson was never called as a witness by Respondent, though there was neither evidence nor representation that he was not available to be called as a witness. Thus, there is no testimony from him which could clarify Long's internally contradictory testimony as to who had made the actual decision to issue the warning notice to Lee during this supposed four-supervisor meeting on February 9.

Aside from the absence of clarification of Long's internally contradictory account as to who had actually made that decision, to the extent that Judson made or participated in that decision, Respondent's failure to call him as a witness warrants an adverse inference with regard to the validity of its defense. As set forth above, "the crucial inquiry must be directed to the state of mind of the official who had made the decision to effectuate" an allegedly unlawful disciplinary decision. *Advanced Installations, Inc*., supra. Failure to call such a decision-maker, to provide firsthand evidence concerning his motivation, warrants an inference adverse to a respondent regarding its motivation. *Douglas Aircraft*, supra, 308 NLRB at 1221.

That situation is not corrected by the testimony of Ploplys and Larson, both of whom were called as witnesses by Respondent. For, neither one of them described a meeting such as Long testified had occurred. Both of them did describe a meeting with Judson during which a decision was made to issue the warning notice to Lee. But, neither Ploplys nor Larson placed Long as having attended that meeting. As a result, rather than corroborating the testimony given by Long, Ploplys and Larson gave testimony, which tended to contradict that of Long. Beyond that, Larson's description of that three-supervisor meeting created additional contradictions in Respondent's defense.

Larson testified that, by the time of this meeting, he had spoken with Walsh about the latter's complaint concerning Lee, as discussed further below. As a result of that conversation, Larson testified, "I brought the subject to the attention of ken Judson and Betty Ploplys," reporting that Lee had been, "Interfering with an employee during his work period." Larson acknowledged that, as a manager, he possessed authority to discipline employees, but explained that, "Generally we get in touch with Betty for more minor infractions."

Of course, as described in section IV, that would be the course followed when materials manager Winkeler decided to issue a warning notice to Williams almost 3 months later. Yet, Judson had become involved in the warning notice issued to Williams only because Ploplys had not been available to participate in the meeting during which the warning notice was

issued to Williams. There is no evidence that Winkeler had sought him out in connection with the actual decision to issue a warning notice to Williams. But, Larson testified that he had conferred with both Judson and Ploplys about whether or not to issue a warning notice to Lee. At no point did Larson explain why he had chosen to confer about that decision with Judson, as well as with Ploplys. More significantly, despite the "chain of command" discussed in section IV at Respondent, Larson had not been Lee's manager—that had been Errico. Yet, it had been Larson, not Errico, who supposedly had participated in the decision to issue the warning notice to Lee.

One may speculate that Judson's involvement had been occasioned because of Lee's support for the Union. Yet, inference can only be taken so far. To reach that conclusion with regard to Larson's decision to confer with Judson, as well as Ploplys, about the decision to issue a warning notice to Lee would be to exceed the bounds of inference and, instead, to supply a defense which Respondent has not advanced. That is not allowed, inasmuch as an "employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions." *Inland Steel Co.*, 257 NLRB 65, (1981). As a result, unexplained is Larson's reason for having chosen to confer with Judson, as well as Ploplys, about the decision to issue the warning notice to Lee and also, of course, Larson's involvement in the decision to issue a warning to Lee.

According to Larson, during his meeting with Judson and Ploplys, "I simply stated that one of my employees wanted to make a complaint," and, "They decided that they were going to give him a warning." Obviously, that account is at odds with the procedure followed in disciplining Williams almost 3 months later and, also, with the general testimony of Respondent's witnesses about how warning notices come to be issued to employees. For, ordinarily it is the supervisor or manager who makes the decision, with the personnel department merely ascertaining if discipline is warranted, as opposed to making the actual decision with respect to the discipline to be imposed. Moreover, it should not escape notice that if that had been all that had been said in arriving at that decision, not only did Judson and Ploplys rely upon a vague and summary account of Lee's offense, but also there was no basis for concluding that, at that time, either Judson or Ploplys had been aware of Lee's wanderings in other departments, as described by Bahling and Hutchison.

In addition to the confusion regarding who had made the actual decision to issue a warning notice to Lee, and to the further confusion concerning precisely how that decision had come to be made, Respondent's defense suffers further confusion upon review of its witnesses' accounts of the events, which had led to the decision to discipline Lee. Three basic facts are not in dispute. Walsh had complained to Supervisor Hall during the morning of February 9. Hall then reported to Larson what Walsh had told her. Finally, Larson then spoke with Walsh. Beyond that, Respondent's evidence is not consistent.

Larson did not describe with particularity his conversation with Hall. He testified merely that she had talked with him about Walsh's complaint and, as a result, "It was my understanding that [Walsh] was complaining about being bothered by Union sympathizers . . . ." So far as it goes, that description is an accurate one, though it hardly is an adequate description of what Walsh had complained about. That appears to be corrected by Larson's description of his ensuring conversation with Walsh. But, as will be seen, Larson's account of that conversation does not altogether square with the one provided by Walsh, when the latter was called as a witness for Respondent.

Larson testified that, "I asked [Walsh] if he wanted to make a complaint about that subject and offered him the opportunity," and Walsh "decided that, yes, he did want to make a complaint," because, "He wanted the harassment or whatever you want to call it discontinued." As to what had been meant by "harassment," Larson testified that Walsh had "said that Dan Lee had talked to him during work period, kept him from his work. He'd been bothered by union sympathizers outside the plant on his way to work and that he'd been bothered by people coming to his house on weekends or times when he was not at work." Thus, Larson's account portrays talking to Walsh during work, thereby keeping him from working by doing so, as the primary subject of Walsh's complaint of "harassment." But, that was not Walsh's description of his complaint.

Larson "came up and asked me about the situation and I said, yeah, I want to be left alone," Walsh testified, explaining that he had said to Larson, "What I told Emma Hall, the supervisor. That I was stopped on the way coming to work *and then I mentioned* having been bothered at work on that Monday." (Emphais added.) Thus, although Walsh did tell Larson about the work-time solicitation of February 5, his testimony about what he had said does not show that work-time interference had been the primary "harassment" which he reported to Larson, as the latter attempted to portray it during his above-quoted description of his conversation with Walsh. The distinction is not an insignificant one.

Hall testified that she had told Larson, "That he had, Len had come to me and complained and it was a formal complaint and he was complaining that he was being bothered at work as well as not getting in to the parking lot without being slowed down that morning." Yet, when she described what Walsh had said to her, before she had spoken with Larson, Hall advanced a description, which shows that Walsh's reference to work interference had not necessarily been based principally upon what had occurred on Monday, February 5:

> A. Len Walsh. Had come to me and told me that [Lee] was bothering him and I said, is this a complaint and he said, yes, this is a formal complaint that I'm putting against him.
>
> . . . .
>
> Q. And what did Mr. Walsh say to you?
>
> A. That he was tired of being bothered at home and that that particular morning he was slowed down getting in to the parking lot by people passing out papers and Dan Lee talking to him and keeping him from performing his pinning job.

Now, Lee had been one of the people who had been talking to employees as they attempted to enter the parking lot on February 9. So from Hall's above-quoted more specific description of what Walsh had said to her that morning, it is unclear that Walsh had been complaining about work interference that

morning, by trying to talk to employees while they were entering Respondent's parking lot, or, alternatively, about a solicitation on Monday, February 5. Indeed, Hall never claimed that she had asked Walsh anything about what had occurred on February 5. Nor did she testify that he had volunteered any description of what Lee supposedly had said to him on that day.

The foregoing testimony by Larson and by Hall somewhat sets the table for Walsh's testimony concerning what had occurred when he arrived for work on Friday, February 9. He testified:

> Friday at the end of that week I was coming to work and Mr. Lee and some other fellow that I had seen in the parking lot, or at the edge of the parking lot handing out flyers,stopped me as I was pulling in to the parking lot to ask me if I'd thought more about joining the Union. Now, since I'd started working at [Respondent] I was told the policy is, punch in and be at your seat five minutes prior to your starting time. Well, my car already had bad car trouble within the past week. And the car was not acting up to my specifications.
>
> I was driving a beater. And I didn't appreciate, one, being stopped from pulling into the parking lot in order to punch in and go to work and two, I had already made myself clear on two occasions that I wasn't interested in whatever they were selling, the Union movement or whatever. And I did not appreciate being stopped as I was coming to work.

As a result, by the time that he had punched in that morning, Walsh was perturbed, according to his own account, not by any solicitation during the preceding Monday, but by the fact that on that occasion and on another occasion he had made clear that he would not support the Union, but nevertheless he was again being solicited to support it, in the process possibly causing his car to malfunction and possibly being caused to report late for work.

That was the message which he testified that he then conveyed to Supervisor Hall after punching in on February 9, although he did also mention to her the preceding Monday's solicitation: "I told her, look, I got bothered Monday and I figured maybe he got the message and would leave me alone. People been knocking on my door every day at home and now they're going to interfere with me pulling in to the parking lot. Possibly making me late." After pointing out that Hall had been aware of his car problems, Walsh testified that "she knows I take my work seriously. I don't like punching in late to work. I usually show up early."

"So, that's when I made a formal complaint," testified Walsh. As to what he had complained about to Hall, Walsh testified:

> I said that I was pulling in and Dan Lee from maintenance and some other fellow, he was tall, had a beard, I'd seen him around the parking lot before handing out flyers, stepped in my way as I was pulling in to the parking lot and Dan asked me if I thought more about joining the Union and I said, look, I gotta get to work. I rolled up my window and I proceeded and they got out of my way and I kept going.
>
> I said, I have [u]nion experience. I've worked in places and I know, this is out of line. You don't bother, you don't keep people from coming to a job, you don't interfere with them while they're performing their job. If you're a friend of theirs and you can talk to them, you know, subtle manner, during a break, I don't know if that's quite legal, but it could be acceptable in some cases, but just to out and out interfere with someone coming to work or doing their work, I know flat out that's wrong.

The singular telling thing about that recitation, in the context of the instant case, is that while Walsh alluded to having been "bothered Monday," and to interference "with them while they're performing their job," he never described to Hall anything which had occurred on Monday, February 5, and his account cannot truly be said to have constituted a complaint about anything which had occurred on that day. Nor did Walsh testify to having provided such a description to Hall when he testified regarding what he had asked her to do. Rather, he testified only,

> Well, first I asked her. . . I mentioned that they had, that people had been coming or knocking on my door, bothering me at home. I have an unlisted phone number. How do they know where I live, in the first place. And she said she would ask about that.
>
> And I just told her, look, I want to make a complaint about being harassed at work. I didn't think that the Company could do anything about getting harassed at home but this was starting to interfere with my work, getting to work. Being on time.

Again, while Walsh did mention "being harassed at work" and "interfere[nce] with my work," it is plain from his recitation of his complaint that he was protesting not being able to "get[ ] to work. Being on time," not being interfered with while actually working, as would have been a complaint about the incident of Monday, February 5.

If it cannot be said that Respondent's officials had learned from Walsh on February 9, what had taken place on Monday, February 5, it is logical to inquire how they might have learned about Lee's solicitation on the latter date. The short answer is that, by February 9, Hall and Larson already had known that the solicitation had occurred. On Monday, February 5, both of them knew that Lee had been in the department (yoke pinning) where he should not have been. They had observed him talking to Walsh while the latter was supposed to be working. They did nothing whatsoever to have Lee disciplined for interfering with Walsh's work—at least, not until they learned that the discussion had pertained to the Union.

Larson testified that, on February 5, "I saw [Lee] having a conversation with one of my employees," Walsh, "during a work period, yes. At [Walsh's] work station." Hall also testified that, on February 5, she had observed Lee come into the yoke pinning department, talk to two of the employees working there and, then, engage in a conversation with Walsh. Despite having perceived a seeming impropriety by Lee, however, admittedly neither official had said anything to Lee about his presence in the yoke pinning department, not about his conversation with employees working there. In contrast to what Hutchison and Bahling would do upon observing Williams

taking an excessive morning break on April 29, as described in section IV, there is no evidence that either Hall or Larson had said anything before February 9, to Supervisor Long nor to Manager Errico about Lee's conversations on February 5 in the yoke pinning department with employees working there.

"I normally do not make a big deal about it if someone stops and says hello to someone, as I did not in this case," Larson tried to explain. But, he estimated that Lee's conversation with Walsh had lasted, "Perhaps ten minutes. Perhaps a little longer." Hall estimated that Lee had spoken with the two other employees for "maybe, I'll say five minutes" or, even, "longer," and, then, that Lee had talked to Walsh "maybe three minutes, four minutes." Surely conversations of such length can hardly be characterized merely as "say[ing] hello to someone[.]"

To be sure, there is no evidence that any official of Respondent had known until Friday, February 9, that Lee had been soliciting Walsh's support for the Union during the February 5 conversation. Even so, the operative question is whether Respondent's officials had been concerned about the "solicitation" aspect of that Monday conversation or, instead, about the "Union" aspect of it. For, despite the existence of Respondent's no-solicitation rule, the record discloses significant credible evidence that solicitations—for sports and other pools, for school-related events such as Market Days and for Girl and Boy Scout sales—occurred with significant regularity at Respondent's facility. It further shows that some employees had participated in such activities during work time and, in fact, that supervisory personnel had participated in such activities on occasions when employees involved were supposed to be working.

Beyond that, as quoted above, neither Long nor Larson—the only two officials who tried to explain Respondent's motivation for having issued the warning notice to Lee—ever truly did claim that Respondent's officials had acted on February 9 because of a sudden disclosure that day that Lee had been soliciting Walsh in the yoke pinning department on February 5. Instead, as quoted above, they testified that Lee had been issued a warning notice, because of a "complaint" by Walsh. Yet, as the latter's above-quoted testimony shows, on February 9 Walsh had not been protesting anything that had taken place on February 5. His complaints were about being solicited at his home and about being delayed getting into Respondent's parking lot on February 9.

True, Walsh did mention having talked to Lee on February 5 and he also mentioned interference with his work. Even so, the former appeared more directed to his prior communications to Lee and other union supporters that he did not want to support the Union. And his comments about work interference were so general and ambiguous that it cannot be said with any certainty that he was complaining about any work interference other than the possibility that the parking lot encounter would interfere with his being able to start work on February 9. Viewed as an objective matter, it cannot be concluded that anything which he said on February 9 to Hall and, then, Larson would have enabled an employer to understand that Walsh's work had been interfered with on February 5 by the solicitations of Lee on that day. The remarks by Walsh were simply too general and, so far as the evidence discloses, Respondent's officials made no effort that day to obtain from Walsh a specific description of what had occurred on the preceding Monday.

In contrast to the seemingly credible appearance and testimony of Winkeler, Hutchison, and Bahling in connection with the warning notice issued to Williams on April 30, Larson and Long gave testimony about Lee's warning notice which was sometimes internally contradictory, other times uncorroborated and, in a few instances, at odds with objective considerations. As they testified, it was my impression that Larson and Long were not being candid. I do not credit them.

Of course, as pointed out in section I, neither did Lee appear to be testifying candidly. His explanation for even being in the yoke pinning department on February 5 is contradicted by the undisputed evidence about the work, which had been assigned to him at that time. His description of the work which he purportedly had been performing there, greasing a conveyor, is contradicted by the uncontested evidence that conveyor greasing could not be accomplished while that department was operating, nor could it be accomplished in so short a period and in the manner which Lee described. Still, as set forth in section I, the ultimate issue here is Respondent's actual motivation for issuing a first written warning notice to Lee, not Lee's character, except to the extent that his character for veracity affects the reliability of his testimony. However, Lee's testimony is not necessary to conclude that Respondent had been unlawfully motivated in issuing that warning notice to him.

Respondent concedes that Lee had been a supporter of the Union. Respondent further admits that it had known of his support at the time that it issued the warning notice to him. That is one objective indicium of unlawful motivation. *Concepts & Designs*, 318 NLRB 948, 952-953 (1995), enfd., 101 F.3d 1243 (8th Cir. 1996), and cases cited therein. At that time, the Union's campaign was in progress at Respondent. When he received the warning notice, Lee attempted to deny having engaged in any misconduct. But, Respondent's officials were unwilling to listen to his denials and, further, were unwilling to even identify the employee who had complained about Lee. Thus, Lee was unable to present a defense and, in any event, Respondent's officials were unwilling to listen to any that he did present. Those are additional objective indicia of unlawful motivation. For they show "that Respondent was not truly interested in whether misconduct had actually occurred" on February 5, *Handicabs, Inc.*, supra, 318 NLRB at 897. Moreover, the very vagueness of Walsh's February 9 references to earlier comments to him by Lee about supporting the Union, and the lack of any evidence that any of Respondent's officials had made an effort to find out in greater detail about the circumstances of Lee's comments to Walsh about the Union, are a further objective indication of unlawful motivation, since they demonstrate that Respondent "did not engage in any independent investigation of" Walsh's remarks, but "relied solely on [Walsh's] complaint." *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 685 (8th Cir. 1996), petition for certiorari pending.

In the face of the foregoing evidence, which establishes unlawful motivation for Respondent's decision to issue a first written warning notice to Lee, the evidence presented by Respondent as to motivation was not credible. In consequence, Respondent has failed to satisfy its burden of going forward

with evidence showing that, absent his union activities, Lee would have been issued a first written warning notice on February 12. Furthermore, in the circumstances, the very fact that Respondent has advanced a defense, which is not credible, is additional evidence of its unlawful motivation. To be sure, aside from Prock's threat of job loss and Krueger's interrogation of Williams, there is no independent evidence that Respondent harbored animus toward Lee for supporting the Union. Still, "[e]ven without direct evidence, the Board may infer animus from all the circumstances." (Citations omitted.) *Electronic Data Systems*, 305 NLRB 219, 219 (1991). Respondent may not have harbored the most virulent animus possible toward Lee for supporting the Union. Nonetheless, to conclude that animus exists, it is not essential to show that an employer harbors the most extreme animus possible. As pointed out in another, but not totally unrelated, context, "a piece of fruit may well be bruised without being rotten to the core." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984).

What appears to have occurred with respect to Lee is that, upon hearing Walsh's complaints about home solicitation and being delayed at the parking lot entrance, Respondent's officials seized upon Walsh's reference to the February 5 solicitation and used it as a spring board to aid Walsh, and possibly also to ensure his continued opposition to the Union, by issuing a warning notice to Lee, thereby demonstrating to Walsh that Respondent was willing to help him, by acting on his complaints, and possibly also to somewhat cool Lee's activism. However, Respondent's officials had known on February 5 that Lee had been talking with Walsh during the latter's work time, but had done nothing about what they had observed. Solicitations were not uncommonly conducted at Respondent's facility during working time. Seizing upon a "colorfully valid reason" which could "ostensibly justify" disciplining Lee, *United States Rubber Co. v. NLRB*, 384 F.2d 660, 662–663 (5th Cir. 1967); see also, *Red Ball Motor Freight, Inc.*, 253 NLRB 871, 872 (1980), enfd., 660 F.2d 626 (5th Cir. 1981), cert. denied, 456 U.S. 997 (1982), after having ignored that conduct for most of that work week, tends to show that Respondent's motivation had been unlawful.

As to the conduct about which Walsh did complain on February 9, there is no contention, nor evidence to support a contention, that the parking lot entrance solicitation had been so conducted as to deprive Lee and other handbillers of the Act's protection on February 9. "It is well established that an employer cannot legally interfere with a union's solicitation of employees when it takes place on a public street and does not obstruct the ingress or egress from the Employer's premises." *First National Bank of Pueblo*, 240 NLRB 184, 184 (1979). Although Walsh's entrance to Respondent's parking lot may have been delayed by the union solicitors, Walsh admitted that they stepped aside when he, in effect, asked them to do so. There is no contention, nor evidence that Lee and those with him actually obstructed ingress to the parking lot in a manner, which deprived their activity of the Act's protection.

While being solicited at one's home may be distasteful to some employees, such contacts, of necessity, are contemplated by the Board's rule in *Excelsior Underwear*, 156 NLRB 1236 (1966). That rule promotes "fair and free choice of bargaining representatives" by, inter alia, "allowing unions the right of access to employees that management already possesses." *NLRB v. Wyman-Gordon Company*, 394 U.S. 759, 767 (1969). So, it follows that home solicitation is not an activity, which is unprotected by the Act. And, as above, there is neither contention nor evidence that home solicitation had been conducted here by Lee and the Union's other supporters in a manner which exceeded the Act's protection.

Therefore, in the totality of the circumstances, I conclude that a preponderance of the credible evidence establishes that Respondent's actual motivation for issuing a first written warning notice to Lee had been rooted in his support for, and activity on behalf of, the Union. In consequence, issuance of that warning notice to Lee violated Sections 8(a)(3) and (1) of the Act and, also, constituted selective and disparate enforcement of a valid no-solicitation rule which independently violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

Clinton Electronics Corporation has committed unfair labor practices affecting commerce by issuing a first written warning notice to Dan Lee because of his support for, and activities on behalf of, United Steelworkers of America, AFL–CIO–CLC, in violation of Sections 8(a)(3) and (1) of the Act, and by selectively and disparately enforcing a no-solicitation rule against union solicitations, by threatening job loss if employees selected the above-named labor organization as their collective-bargaining agent, and by coercively interrogating an employee about her union activities, in violation of Section 8(a)(1) of the Act. However, it has not violated the Act in any other manner alleged in the complaints.

REMEDY

Having concluded that Clinton Electronics Corporation has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, there has been some indication that warning notices are expunged from its files after a year, if an employee commits no additional violations of company rules. Thus, the unlawfully motivated warning notice to Dan Lee may already have been expunged. Nonetheless, to ensure that expunction is accomplished, Clinton Electronics Corporation shall be ordered, to the extent that it has not already done so, see, e.g., *Colorflo Decorator Products*, 228 NLRB 408, 420 (1977), enfd. mem., 582 F.2d 1289 (9th Cir. 1978), to remove from its files, within 14 days from the date of this Order, the first written warning notice, and any reference to the first written warning notice, dated February 9, and issued to Dan Lee on February 12, 1996. It shall notify Lee, within 3 days after doing so, or within 17 days of the date of this Order if the warning notice and all references to it have already been removed from its files, that this has been done and that that the first written warning notice shall not be used against him in any way.

Upon the foregoing findings of act and conclusions of law, and upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended [18]

ORDER

Clinton Electronics Corporation, Loves Park, Illinois, its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Selectively and disparately enforcing its valid no-solicitation rule by applying it against solicitations on behalf of the United Steelworkers of America, AFL–CIO–CLC, or by any other labor organization, while disregarding other types of solicitations; threatening employees with loss of jobs should they choose to become represented by that union, or by any other labor organization; and, coercively interrogating employees concerning their activities on behalf of that union or any other labor organization.

(b) Issuing a first written warning notice to, or otherwise discriminating against, Dan Lee, or any other employee, because of support for and activity on behalf of the above-named union or on behalf of any other labor organization.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) To the extent that it has not already done so, within 14 days from the date of this Order, remove from its files the first written warning notice dated February 9, and issued on February 12, 1996, to Dan Lee, and all references to it, and within 3 days thereafter, or within 17 days from the date of this Order if the notice and all references to it have already been removed, notify Lee in writing that this has been done and that the warning notice shall not be used against him in any way.

(b) Within 14 days after service by the Region, post at its Loves Park, Illinois place of business copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by its duly authorized representative shall be posted by Clinton Electronics Corporation and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. ~~Reasonable steps shall be taken by it to~~ ensure that the notices shall be taken by it to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Clinton Electronics Corporation has gone out of business, or closed the Loves Park facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since August 26, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to steps that it has taken to comply.

IT IS FURTHER ORDERED that the complaints be, and they hereby are, dismissed insofar as they allege violations of the Act not found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this Notice.

The National Labor Relations Act gives all employees the following rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate you concerning your activities on behalf of United Steelworkers of America, AFL–CIO–CLC, or on behalf of any other union.

WE WILL NOT threaten you with loss of jobs should you select the above-named union or any other union to be collective-bargaining agent.

WE WILL NOT selectively and disparately enforce our valid no-solicitation rule by enforcing it against solicitation of behalf of the above-named union, or any other, while allowing other types of solicitation to be conducted.

WE WILL NOT in any lie or related manner, interfere with, restrain, or coerce you in the exercise of your rights protected by the National Labor Relations Act.

CLINTON ELECTRONICS CORPORATION

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."